Supreme Court, U.S.
FILED
021202 FEB 13 2003
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

eWealth USA, Inc., eWealth America, Inc., Argent Capital Corp., and Argent Financial Services, Inc.,
Petitioners

v.

Lincoln Benefit Life Company, Inc.

On Petition for Writ Of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Tom A. Dickens
Counsel of Record

Lisa J. Thiele
Dickens & Associates
15840 FM 529, Suite 211
Houston, Texas 77095
281-855-4100
Attorneys for Petitioners

193 pp

QUESTIONS PRESENTED

Petitioners seek review of the following questions:

1. Did the lower courts commit egregious errors and did these egregious errors deprive Petitioners of their right to due process when the courts refused to follow the Federal Rules of Civil Procedure and federal statutes, refused to follow the precedent of the U.S. Supreme Court and the Eighth Circuit, refused to apply Nebraska law to hundreds of judicially admitted facts [137 affirmatively admitted Rule 36 admissions, pleading and testimonial admissions] and refused to honor the trial court's order regarding the conclusive nature of judicial admissions?

2. Is it essential for the protection of a litigant's right to due process of law for the trial courts to clearly and accurately identify the determinative facts and controlling law and for all courts to demonstrate through well reasoned opinions their conclusions so litigants and reviewing appellate courts can understand the basis of the judgments and opinions?

3. If a party is deprived of its right to due process and that deprivation of due process is not apparent within the "four corners" of the judgment or opinion is that party's right to due process therefore a lesser protected right not requiring the Supreme Court's exercise of supervisory power?

4. Is *de novo* review required not only for questions of law but also for fact finding when the fact finding is made under an erroneous understanding of the law; and, to avoid inconsistent determinations of the standard of review and to assure legal questions are always reviewed *de novo*, should the appellate courts bifurcate mixed questions so that only determinations of fact from conflicting evidence are reviewed under the clearly erroneous standard and all questions of law are reviewed *de novo*?

LIST OF THE PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.6

Pursuant to Supreme Court Rule 14.1(b), Petitioners are Argent Financial Services, Inc., eWealth USA, Inc., eWealth America, Inc. (collectively referenced "eWealth"), and Argent Capital Corporation ("ACC"). All Petitioners are collectively referenced as "Argent" and certify that the names of all parties to this proceeding appear in the caption of this Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 29.6, Petitioner Argent Capital Corporation, a Nevada Corporation, is the parent company and wholly owns Argent Financial Services, Inc. whose name was subsequently changed to eWealth USA, Inc. and then subsequently changed to eWealth America, Inc., Petitioners herein. No other publicly held corporation or other publicly held entity owns 10% or more of the corporation's stock.

Lincoln Benefit Life Company, Inc. ("LBL") was the original Plaintiff and Appellee below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF THE PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE WRIT 5

1. Certiorari should be granted because due process is fundamental to the federal legal system and should be protected by this Court. 5

A. The lower court's "fact finding" deprived Petitioner of its right to due process. 5

B. The lower courts handling of the law violated due process. 6

2. Certiorari should be granted because the lower courts ignored and controverted hundreds of judicially admitted facts (Rule 36, pleadings and testimonial) and

uncontroverted evidence, conflicting with the holding of this Court, the Eighth Circuit and other circuits. 8
A. Admissions made pursuant to Federal Rules of Civil Procedure 36 are conclusive of the matters admitted and cannot be controverted or ignored..... 8
B. Admissions in pleadings are binding and the lower courts' decisions are in conflict with Nebraska law. .. 10
C. Testimonial admissions bind the party making the statement and are judicial admissions..... 11
D. Uncontroverted evidence establishes a fact as a matter of law leaving no function for the fact finder. 12
E. Summary of the judicially admitted and uncontroverted facts. 12
i. Offer and acceptance of the 1999 Letter Agreement was admitted..... 13
ii. Performance by all parties to the 1999 Letter Agreement was admitted..... 13
iii. Existence of a contract, the 1999 Letter Agreement, and LBL's breach therof was admitted.. 14
iv. LBL admits it kept its intent not to be bound a secret during the months of performance. 15
v. LBL's admissions relevant to Argent's damages and damage calculations..... 16
F. Admissions conclusion..... 16

3. Certiorari should be granted because the courts failed to properly state and apply Nebraska law and such blatant disregard for well-settled legal precedent requires this Court's supervisory review..... 17
A. Nebraska law must be applied in this case... 17
B. The lower courts failed to properly interpret and/or apply Nebraska law. 18
i. Nebraska law, if applied to the judicially admitted and uncontroverted historical facts would have established the 1999 Letter Agreement as an enforceable contract, as a matter of law..... 18

ii. The finding that the 1999 Letter Agreement was not an enforceable contract for "three reasons" was done by ignoring Nebraska law..... 19

a. The trial court failed to follow Nebraska law regarding necessary terms and the effect of performance. 19

b. The trial court in determining intent to contract ignored the judicially admitted objective evidence, which is controlling under Nebraska law 20

c. The trial court improperly interpreted the legal principal of supersession. 20

iii. The lower courts methodology in finding the February 2000 Loan Agreement was an enforceable contract violated federal statutes..... 21

iv. The trial court found ratification *sua sponte*.... 23

4. Certiorari should be granted because the lower courts failed to provide reasoned legal opinions required to safeguard due process, i.e. failed to address legal issues..... 23

5. Certiorari should be granted even though many of the egregious errors are not apparent on the "four corners" of the lower courts' opinions.. 25

6. Certiorari should be granted in order to ensure a litigants' right to receive the proper review under the appropriate standard of review. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

999 v. CIT, 776 F.2d. 866 (9th Cir. 1985) 9
Acme Inv., Inc. v. Southwest Tracor, Inc., 911 F. Supp. 1261 (D. Neb.1995) aff'd, 105 F.3d 412 (8th Cir. 1997) 20
Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 4
Am. Auto. Ass'n v. AAA Legal Clinic of Jefferson, 930 F.2d 1120 (5th Cir. 1991) 9
Barker v. Ceridian Corp., 122 F.3d 628 (8th Cir. 1997) 18
Braxton v. U.S., 500 U.S. 344 (1991) 27
Brillhart v. Philips Elec. N.A. Corp., 179 F.3d 1271 (10th Cir. 1999) 11
Brook Village N. Ass'n v. Gen. Elec. Co., 686 F.2d. 66 (1st Cir. 1982); 9
Brown v. Gurney, 201 U.S. 184 (1905) 12
Caro, Inc. v. Roby, 342 N.W.2d 182 (Neb. 1983) 21
Coop. Refinery Ass'n v. Consumers Public Power Dist., 190 F. 2d 852 (8th Cir. 1951) 20, 21
DeFillipps v. Skinner, 211 Neb. 801 (Neb. 1982) 20
Dick v. N.Y. Life Ins. Co., 359 U.S. 437 (1959) 4, 17, 22
Elec. Dev. Co. v. Robson, 28 N.W.2d 130 (Neb. 1947). 21
Entergy Services, Inc. and Entergy Ark., Inc. v. Union Pac. R.R. Co., 35 F. Supp. 2d 746 (D. Neb. 1999) 19
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 4, 6, 17, 22
Franksen v. Crossroads Joint Venture, 515 N.W. 2d 794 (Neb. 1994) 22
Guar. Trust Co. v. York, 326 U.S. 99 (1945) 4, 17
Hanika v. Rawley, 368 N.W.2d 32 (Neb. 1985) 19
Hanna v. Plumer, 380 U.S. 460 (1965) 4, 17
Hercules Powder Co. v. Costa, 289 F.2d 571 (1st Cir. 1961) 11
Heritage Bank v. Redcom Lab. Inc., 250 F.3d 319 (5th Cir. 2001) 11
Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844 (1984) ... 28
Jindra v. Clayton, 529 N.W. 2d 523 (Neb. 1995) 27

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 23
Jones Truck Lines, Inc. v. Cent. States, 130 F.3d 323 (8th Cir. 1997) 12
Jones v. Moorehead, 68 U.S. 155 (1863) 10
Keller v. Bones, 615 N.W.2d 883 (Neb. 2000) 18
Knudsen v. U.S., 254 F.3d 747 (8th Cir. 2001) *citing* Soo Line R. Co. v. St. Louis Southwestern Ry. Co., 125 F3d 481 (7th Cir. 1997) 10
Kort v. W. Surety Co., 705 F.2d 278 (8th Cir. 1983) 21
Luther v. Loewi & Co., Inc., 549 F.2d 1173 (8th Cir. 1977) 11
Maixner v. Travelers Ins. Co., 276 N.W. 163 (Neb. 1937) 23
Marbury v. Madison, 5 U.S. 137 (1803) 31
McSparran v. Hanigan, 225 F.Supp. 628 (D. Pa. 1963), aff'd, 356 F.2d 983 (3d. Cir. 1966) 8
Meier v. Geldis, 26 N.W.2d 813 (Neb. 1947) 21
Missouri Hous. Dev. Com'n v. Brice, 919 F.2d 1306 (8th Cir. 1990) 10
Nebraska Nutrients v. Shepherd, 626 N.W.2d 472 (Neb. 2001) 19, 20
Nelson v. Adams, 529 U.S. 460 (2000) 4
Ornelas v. U.S., 517 U.S. 690 (1996) 29
Overman v. Brown, 372 N.W.2d 102 (Neb. 1985) 18
Pac. Indem. Co. v. Broward County, 465 F.2d 99 (5th Cir. 1972) 22
Palmer v. Hoffman, 318 U.S. 109 (1943) 4, 22
Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d. 228 (7th Cir. 1988), cert. denied, 493 U.S. 847 (1989). 30
Payne v. Tennessee, 501 U.S. 808 (1991) 7
Pokorski v. McAdams, 285 N.W.2d 824 (Neb. 1979) 22
Pullman-Standard v. Swint, 456 U.S. 273 (1982) 29
PWA Farms, Inc v. North Platte State Bank, 371 N.W.2d 102 (Neb. 1985) 22
Ray Tucker & Sons v. GTE Directories Sales Corp., 571 N.W.2d 64 (Neb. 1997) 27
Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981) 12
Salve Regina College v. Russell, 499 U.S. 225 (1991) 17

Sanden v. Mayo Clinic, 495 F.2d 221 (8th Cir.1974) 22
Scharman v. Scharman, 56 N.W. 704 (Neb. 1893) 19
Silver v. N.Y. Stock Exchange, 373 U.S. 341 (1963) 5
Solar Motors, Inc. v. First Nat'l Bank of Chadron, 545 N.W.2d 714 (Neb. 1996) 18
Tilt-Up Concrete v. Star City/Federal, Inc., 582 N.W.2d 604 (Neb. 1998) 20
TXO Prod. Corp. v. Alliance Res., 509 U.S. 443 (1993) 24
U.S. Shipping Bd. Emergency Fleet Corp. v. S. Atl. Dry Dock Co., 19 F.2d 486 (5th Cir. 1927) 8
U.S. v. Gypsum Co., 333 U.S. 364 (1948) 27
U.S. v. Louisiana, 394 U.S. 11 (1969) 7
U.S. v. Payner, 447 U.S. 727 (1980) 4
U.S. v. Pollard, 249 Fed.3d. 738 (8th Cir. 2001) 6
Utilities Ins. Co. v. Stuart, 278 N.W. 827 (Neb. 1938). 10, 20
W. Fertilizer and Cordage Co., v. BRG, Inc., 424 N.W.2d 588 (Neb. 1988) 21
Wiget v. Becker, 84 F.2d 706 (8th Cir. 1936) 8, 11
Willy v. Coastal Corp., 503 U.S. 131 (1992) 4

Statutes

28 U.S.C. § 636(b)(1)(A) 9
28 U.S.C. § 1254 (1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1332 (a) 1
28 U.S.C. § 1652 ..... 2, 17, 21
28 U.S.C. § 2072 ..... 2, 4, 22
28 U.S.C. § 2073 4
28 U.S.C. § 2074 4

Other Authorities

Black's Law Dictionary, 266 (7th ed. 1999) 29
C. Wright & A. Miller, Federal Practice and Procedure,

§ 2255 (2d. ed. 1987) 8
Federal Judicial Center, Judicial Writing Manual, 1 (1991). 24
Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong. 1 Sess. 24 (1975) 9
Restatement (Second) of Contracts § 54 (2)(b) (1981) 18
Restatement (Second) of Agency § 98, cmt c. 23
Steven Alan Childress & Martha S. Davis, 1 Federal Standards of Review § 2.16 (3d ed. 1999) 28, 30
Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371, 421 8

Rules

8th Cir. R. App. I (4) 3
Fed. R. Civ. P. 1 6
Fed. R. Civ. P. 16 23
Fed. R. Civ. P. 26 8
Fed. R. Civ. P. 36 ..... passim
Fed. R. Civ. P. 52 (a) 27, 28, 29
Fed. R. Civ. P. 72 9
Fed. R. Evid. 102 7
Fed. R. Evid. 302 17
Nebraska Local Rule 72.3 (b) 9

Constitutional Provisions

Fifth Amendment to the United States Constitution 2, 4

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a Writ of Certiorari to review the opinion of the Eighth Circuit Court of Appeals that upheld the Nebraska District Court's Judgment.

DECISIONS BELOW

The following unpublished decisions in this case directly relate to the questions presented:

Lincoln Benefit Life Co., Inc. v. eWealth USA, Inc., eWealth America, Inc., Argent Capital Corp., and Argent Financial Services, Inc., No. 4:00CV3130 (D. Neb. filed January 17, 2002). App. 6-43.

Lincoln Benefit Life Co., Inc. v. eWealth USA, Inc., eWealth America, Inc., Argent Capital Corp., and Argent Financial Services, Inc., No. 02-1782 (8th Cir. filed Oct. 18, 2002). App. 3-5.

STATEMENT OF JURISDICTION

Petitioner seeks review of an Order of the Eighth Circuit Court of Appeals issued October 18, 2002. App. 3-5. Petitioner filed its Petition for Rehearing *En Banc* on October 29, 2002. The Court of Appeals denied Argent's Petition for Rehearing on November 21, 2002. App. 44.

The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1) to review the Eighth Circuit Court of Appeal's decision by Writ of Certiorari. The Nebraska District Court had jurisdiction over this case based upon diversity of citizenship pursuant to 28 U.S.C. § 1332 (a). The United States Court of Appeals for the Eighth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution reads in relevant part: "No person shall be ... deprived of life, liberty or property without due process of law...."

The Rules of Decision Act, 28 U.S.C. § 1652 reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Rules Enabling Act, 28 U.S.C. § 2072 reads in relevant part:

> "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts...and courts of appeals."
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

STATEMENT OF THE CASE

Argent informed Lincoln Benefit Life (LBL) that Argent considered LBL to be in breach of the September 1999 Letter Agreement entered into by LBL with eWealth and ACC[1] and denied liability under the February 2000 Loan Agreement

---

[1] App. 24-43.

entered into between LBL and eWealth only.[2] After being informed of Argent's position, LBL filed suit against Argent in Nebraska federal district court based upon diversity of citizenship complaining of the February 2000 Loan Agreement. Argent counterclaimed against LBL asserting that LBL had breached the September 1999 Letter Agreement. After a bench trial, the Nebraska district court found that the 1999 Letter Agreement was not an enforceable agreement and that the February 2000 Loan Agreement was an enforceable agreement for which Argent was liable. The Eighth Circuit upheld the district court's opinion in an unpublished[3] *per curiam* opinion classified as "affirmed without comment."

SUMMARY OF THE ARGUMENT

Petitioner has been egregiously deprived of its right to due process by the lower courts in their unpublished opinions. If the lower courts had written opinions which memorialized the reality of their actions, they would have written opinions which would hold for the premises that: (1) Rule 36 admissions, admissions in pleadings, testimonial admissions, and the court's own order are no longer binding and may be freely ignored at any time by the court without notice to the parties; (2) the federal courts are no longer bound by state law in diversity cases; (3) the federal courts are no longer bound by any procedural requirement such as Rule 36 (b) for the withdrawal of admissions; (4) the federal courts have no duty or obligation to write reasoned opinions which disclose the basis of their opinions and rulings thereby making any meaningful understanding or appellate review impossible; (5) the deprivation of due process if not apparent on the face of the judgments are of no concern to the appellate courts; (6) the appellate courts

---

[2] App. 107-110.

[3] 8th Cir. R. App. I (4) (Eighth Circuit deviated from its own publishing rules). App. 105-106.

have no obligation to follow their rules for opinion writing and publication; and (7) the federal courts have no duty to follow the doctrine of *stare decisis,* regardless of its source including the U.S. Supreme Court.[4]

"[C]ourts must be mindful that the Rule...sets the requirements they are bound to enforce. Federal Rules take effect after ...involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The... rule...limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered...". Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). The lower courts are under an obligation to comply with this Court's past holdings and federal statutes until overruled or amended.[5] The Federal Rules of Civil Procedure are designed to further the due process of law guaranteed by the Constitution.[6] Compliance by the lower courts is not discretionary but mandatory and anything less deprives a litigant of the fundamental right to due process.[7]

The district courts are not allowed to substitute their individual judgment for the controlling decisions of this Court. U.S. v. Payner, 447 U.S. 727, 737 (1980). Such action by the lower courts, as in this case, deprives litigants of due process and requires the supervisory power of this Court to not only correct but ensure future protection of these rights.

This Court should grant certiorari in order to establish that the fundamental right to due process is more than just notice and an opportunity to be heard at the onset of a lawsuit. Due process applies to all of those procedural safeguards that are in place to govern not only the parties'

---

[4] Dick v. N.Y. Life Ins. Co., 359 U.S. 437 (1959); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), Guar. Trust Co. v. York, 326 U.S. 99 (1945); Palmer v. Hoffman, 318 U.S. 109 (1943); Hanna v. Plumer, 380 U.S. 460 (1965).

[5] Hanna v. Plumer, 380 U.S. 460, 471 (1965); see also Willy v. Coastal Corp., 503 U.S. 131, 134-135 (1992).

[6] Nelson v. Adams, 529 U.S. 460, 465 (2000).

[7] U.S. Const. amend. V.

actions during the litigation and appellate process but also the courts' actions. Due process applies to factual determinations from conflicting evidence, selection of facts for the application of law, and selection, interpretation and application of law. Further, due process requires the courts' opinions to fairly, clearly, and accurately state the significant facts and relevant rules of law and demonstrate by its analysis the reasonableness of its conclusions.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted because due process is fundamental to the federal legal system and should be protected by this Court.

"Experience teaches...that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring." Silver v. N.Y. Stock Exchange, 373 U.S. 341, 366 (1963). Due process is at the very heart and foundation of our constitutional guarantees. Without due process no other constitutional guarantees are protected and unless it is an open process subject to public scrutiny, due process is only an illusion and guarantees nothing.

A. The lower court's "fact finding" deprived Petitioner of its right to due process.

"Fact finding" is more than just the determination of a fact from conflicting evidence. It also includes the identification of facts, which are material to the legal issues before the court. Fundamental to "due process" is the right to have the court only consider those material facts which are properly before the court and determinative, according to precedent, of the legal issues presented. Only through adherence to these prescribed procedures can the judicial system ensure that parties are being afforded due process.

The egregiousness of the lower courts' errors regarding the facts of this case can only be seen in light of the long list of judicially admitted facts. These facts are established as a matter of law. In this case, there were hundreds of material facts judicially admitted by LBL's affirmative responses to 137 Rule 36 admissions,[8] LBL's pleadings, and the testimony of LBL's own officers. The trial court allowed evidence to be admitted, over objection, controverting the judicial admissions and made it clear the court intended to hear all of the evidence.[9] Despite the opportunity to cure this error in a bench trial, the trial court, without explanation or mentioning a single judicial admission in the judgment, made findings of fact which excluded each and every judicially admitted fact. The facts "found" by the court were not supported by the record or were not material under controlling precedent. By its findings of fact, the trial court violated Rule 36, its own order, and the binding precedent of the Eighth Circuit and this Court.

B. The lower courts handling of the law violated due process.

There is an absolute right of a litigant to: (1) have the correct law selected;[10] (2) have the proper substantive law correctly recited and properly interpreted; (3) have the Federal Rules of Civil Procedure, including its procedural requirements, followed by the courts and applied in a manner consistent with the rules including the scope and purpose of Rule 1;[11] (4) have precedent followed including that of the applicable circuit until overturned *en banc;*[12] (5) have the Federal Rules of Evidence "construed to secure

---

[8] App. 63-66, 70-71, 75-103.

[9] App. 112-113 (TR:208-210).

[10] Federal courts sitting in diversity apply state substantive law and federal procedural law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[11] The rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action". Fed. R. Civ. P. 1.

[12] See U.S. v. Pollard, 249 Fed.3d. 738, 739 (8th Cir. 2001).

fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined" (Fed. R. Evid. 102); (6) have the controlling facts identified and determined pursuant to controlling precedent as necessary for the application of the law; and (7) have the law properly applied to the controlling facts.

Only by honoring the doctrine of *stare decisis* can the outcome of cases be predictable and fair, the very purpose of due process. *Stare decisis* "[i]s the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). *Stare decisis* is a valuable and required principle because by making the governing legal rules predictable, it enables private parties to determine their rights without litigation and enables lower courts to dispose of the great bulk of disputes that result in litigation. U.S. v. Louisiana, 394 U.S. 11 (1969).

Specifically in this case, the trial court failed to apply clearly established long standing Nebraska law to the judicially admitted and uncontroverted controlling facts relevant to the issues before the trial court. Some of these issues are contract formation, sufficiency of contract terms, contract interpretation, the effect of performance on intent to be bound to a contract, objective intent to be bound to a contract, the effect of performance on a party's right to later claim the agreement was not binding, the doctrine of estoppel, contract ratification, the authority of an agent, and the supersession doctrine. Although these substantative and controlling legal issues were raised to the lower courts, they ignored the issues or misstated clear long standing Nebraska law of which they had previously demonstrated an understanding while ignoring hundreds of judicially admitted facts which were controlling of the legal issues. In

so doing the courts deprived Argent of its right to trial and appellate review in a manner consistent with due process.

2. Certiorari should be granted because the lower courts ignored and controverted hundreds of judicially admitted facts (Rule 36, pleadings and testimonial) and uncontroverted evidence, conflicting with the holding of this Court, the Eighth Circuit and other circuits.

A. Admissions made pursuant to Federal Rules of Civil Procedure 36 are conclusive of the matters admitted and cannot be controverted or ignored.

This is a matter of first impression for this Court. The lower courts' holdings in this case conflict with the language of Federal Rules of Civil Procedure 36, the holdings of the circuits, and the Eighth Circuit. Rule 36 provides a clear procedure for a party to admit the truth of any matters within the scope of Rule 26 (b). Ultimate facts can be admitted the same as a basic fact.[13] If judicial admissions are not dependable, it would turn Rule 36 into a "useless appendage"[14] and would defeat its function if a party were free at trial to deny those matters previously admitted.[15]

A party is not only prohibited from offering facts, which controvert judicial admissions, but also from even making contentions that controvert those judicial admissions. U.S. Shipping Bd. Emergency Fleet Corp. v. S. Atl. Dry Dock Co., 19 F.2d 486, 489 (5th Cir. 1927). Evidence that controverts judicial admissions cannot be considered on appeal. Wiget v. Becker, 84 F.2d 706, 710-711 (8th Cir. 1936). Judicial admissions prohibit any dispute regarding the admitted matter and prohibit the use of evidence to disprove or

---

[13] C. Wright & A. Miller, Federal Practice and Procedure, § 2255 (2d. ed. 1987).

[14] Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371, 421.

[15] McSparran v. Hanigan, 225 F.Supp. 628, 636-637 (D. Pa. 1963), aff'd, 356 F.2d 983 (3d. Cir. 1966).

contradict it. Brook Village N. Ass'n v. Gen. Elec. Co., 686 F.2d. 66, 70-73 (1st Cir. 1982); Am. Auto. Ass'n v. AAA Legal Clinic of Jefferson, 930 F.2d 1117, 1120 (5th Cir. 1991); 999 v. CIT, 776 F.2d. 866, 869-870 (9th Cir. 1985).

Federal Rules of Civil Procedure 36 (b) states, "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." It further sets out the procedural and substantative requirements to withdraw or amend admissions. Two months prior to trial LBL filed a motion with the court to withdraw and amend 32 of their 137 Rule 36 admissions. The court denied LBL's request finding that Argent would be prejudiced by such an amendment. The order was entered by the magistrate and therefore subject to Federal Rules of Civil Procedure 72. Rule 72 establishes the procedural requirements to appeal a decision of a magistrate under 28 U.S.C. § 636(b)(1)(A) and Nebraska Local Rule 72.3 (b) describes the local application of the Rule. If a party does not object within ten days of service, the unappealed order becomes an order of the district court.[16] LBL did not appeal the order. The order stated that the effect of these 137 affirmative responses to Rule 36 admissions was that of "...foreclosing factual inquiries into the matters admitted..." and that LBL must "bear the consequences" of their admissions. App. 54-55. The order further stated that if the admissions had been withdrawn Argent would have been "hard pressed to prepare for trial without additional costly discovery and, more importantly, they have relied upon the [LBL's] admissions in preparing to present their defenses and cannot recover without substantial hardship." App. 54-55. The trial court quietly discarded each and every judicial admission after the close of evidence without notice to

---

[16] Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong. 1st Sess. 24 (1975).

Argent until receipt of the judgment two months later. The trial court's judgment made no mention of any judicial admissions; regardless, the Eighth Circuit stated the trial court did "not err in construing LBL's admissions" [App. 4] despite no evidence they were even considered. Argent had a right to rely upon the lower courts following the precedents of the circuits, the language of the Federal Rules of Civil Procedure, and the trial court's order; their failure has deprived Argent of its right to due process.

B. Admissions in pleadings are binding and the lower courts' decisions are in conflict with Nebraska law.

LBL has judicially admitted in its pleadings the existence of a prior contract among the parties. The Eighth Circuit has previously recognized "a party is bound by what it states in its pleadings...judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible." Knudsen v. U.S., 254 F.3d 747, 752 (8th Cir. 2001) *citing* Soo Line R. Co. v. St. Louis Southwestern Ry. Co., 125 F3d 481, 483 (7th Cir. 1997).[17] In LBL's Answer, LBL plead, not in the alternative, "...that the loan agreement of February, 3, 2000 is a contract complete in itself and supersedes and discharges any prior agreements made between the parties." App. 105. Under Nebraska law, LBL's pleading of supersession is a confession and avoidance; consequently, the Letter Agreement sued on by Argent stands admitted by LBL. Utilities Ins. Co. v. Stuart, 278 N.W. 827, 832 (Neb. 1938). LBL judicially admitted a prior agreement and the only agreement for which Argent sought recovery was the 1999 Letter Agreement. LBL sought to avoid the consequences of the 1999 Letter Agreement by pleading supersession and in so doing judicially admitted the 1999 Letter Agreement was an enforceable contract.

---

[17] See also Missouri Hous. Dev. Com'n v. Brice, 919 F.2d 1306 (8th Cir. 1990); Jones v. Moorehead, 68 U.S. 155 (1863).

The lower courts found the 1999 Letter Agreement was not an enforceable contract by ignoring and controverting LBL's pleadings, a judicial admission that the 1999 Letter Agreement was a contract. Ignoring LBL's admission of the prior agreement was an egregious error. This action by the lower courts deprived Petitioner of its absolute right to rely upon the opposing party's pleading. Such deprivation is a denial of due process of law.

C. Testimonial admissions bind the party making the statement and are judicial admissions.

A statement qualifies as a judicial admission if the party making the statement has special knowledge, makes a deliberate, clear, and unequivocal statement in a judicial proceeding about a fact on which a judgment for the opposing party can be based and it is not retracted and/or explained by the party giving the evidence. Heritage Bank v. Redcom Lab. Inc., 250 F.3d 319, 329 (5th Cir. 2001). Parties are bound by the testimony of their own witnesses. Wiget v. Becker, 84 F.2d 706, 710-711 (8th Cir. 1936). Plaintiff is bound by his own testimony within his own knowledge. Hercules Powder Co. v. Costa, 289 F.2d 571, 572 (1st Cir. 1961). A verdict should be directed against a party if the party's own testimony, if true, would defeat his right to a verdict. Luther v. Loewi & Co., Inc., 549 F.2d 1173 (8th Cir. 1977).[18] The lower courts ignored legal precedent. Argent had a right to rely upon Eighth Circuit controlling case law which requires the lower courts to find that a party is bound by its own testimony, in this case it was the testimony of LBL's own officers. Any other holding ignores and controverts the testimony of LBL's own officers which establishes the 1999 Letter Agreement as a contract and establishes performance, breach, and the parameters of

---

[18] See Brillhart v. Philips Elec. N.A. Corp., 179 F.3d 1271, 1275 (10th Cir. 1999)(party bound by own 'admission' unless the 'admission' is modified or explained by additional testimony).

Argent's damage model. Argent had an absolute right to rely upon the testimonial judicial admissions of LBL's own officers. If parties cannot rely upon this right then it is a deprivation of due process.

D. Uncontroverted evidence establishes a fact as a matter of law leaving no function for the fact finder.

Due process requires that a court cannot reject uncontroverted evidence without a clear and convincing reason and the factual basis for rejecting must appear in the record. Rhodes v. Schweiker, 660 F.2d 722, 723 (9th Cir. 1981). Uncontroverted, unchallenged evidence establishes a fact as a matter of law. Jones Truck Lines, Inc. v. Cent. States, 130 F.3d 323, 328 (8th Cir. 1997). A fact admitted and uncontroverted by a party at trial is not open to being controverted at the appellate court level. Brown v. Gurney, 201 U.S. 184, 190 (1905).

Uncontroverted evidence, as does a judicial admission, proves a fact as a matter of law and places it beyond the authority of the fact finder. LBL was in a position to controvert evidence, if it had not been true. Uncontested evidence regarding a specific fact proves that fact as a matter of law and leaves only legal questions to be resolved by the court. This leaves only the application of law to facts established by judicial admissions and uncontroverted evidence. It is a litigant's absolute right to rely upon such evidence and the court's failure to apply the law to those uncontroverted facts denies the litigant its right to due process.

E. Summary of the judicially admitted and uncontroverted facts.

The egregious nature of the lower court's errors can only be seen in light of the full spectrum of the judicially admitted and uncontroverted evidence. All of the references to "admit" refer to a Rule 36 admission. All of these factual references cover a period of time from the

execution of the 1999 Letter Agreement, subsequent performance, and breach. All admissions reference the period of time before the execution of the February 2000 Agreement. The admitted and uncontroverted facts are:

i. Offer and acceptance of the 1999 Letter Agreement was admitted.

LBL admits all of the facts regarding creation and exchange of the offer and acceptance documents[19] and LBL's President, Wraith, had the authority to contract.[20] LBL admits giving Argent permission to use the signed offer to attract investors.[21] The offer and acceptance documents are referenced as the 1999 "Letter Agreement." By August 1999, it was uncontroverted that Argent had a market capitalization of more than $50,000,000.[22]

ii. Performance by all parties to the 1999 Letter Agreement was admitted.

LBL admits sending Argent $100,000 in October 1999, $100,000 in November 1999, $200,000 in December 1999, and $75,000 in January 2000.[23] LBL admits the $475,000 was loaned prior to 2-1-00 with the expectation of being repaid.[24] There is no evidence of anything except full performance by all parties, which continued from the signing of the 1999 Letter Agreement until LBL's breach in February 2000. Performance included agents being signed up, products being sold before January 2000,[25] and commencement of the spin-off of eWealth[26] by ACC as required pursuant to the terms of the 1999 Letter Agreement.

---

[19] App. 76-78 (LBL Responses to RFA).
[20] App. 77 (LBL Response to 1st set RFA 30,34).
[21] App. 79 (LBL Response to 1st set RFA 62).
[22] App. 121 (Lehrer's cross examination).
[23] App. 78- 79 (LBL Response to 1st set RFA 45,46,47,155).
[24] App. 79 (LBL Response to 1st set RFA 10,119; 2nd set RFA 7).
[25] App. 142.
[26] App. 79 (LBL Response to 1st RFA 60).

iii. Existence of a contract, the 1999 Letter Agreement, and LBL's breach thereof was admitted.

LBL admitted that as of January 12, 2000, it was true, reasonable and reliable information that "LBL did not advance any funds that were not previously committed."[27] LBL admitted the commitment as of January 18, 2000, a date before the February Agreement, was a singular financial commitment by judicially admitting "***the*** financial commitment was larger than usual..." (emphasis added).[28]

LBL admitted being a part of Argent[29]; admitted a fit between Argent and LBL;[30] and that LBL complemented Argent.[31] LBL was prepared to do everything possible to make it a rewarding venture for everyone involved and LBL was proud to be a part of it.[32] Further, LBL's and Allstate's commitment to Argent was true.[33] These statements were made after the signing of the 1999 Letter Agreement and before the February 2000 agreement and LBL admitted the information was true, reasonable and reliable.[34]

Wraith, LBL's president, testified that LBL loaned Argent money so that Argent would sell LBL's products[35] and that if LBL had not "discontinued" the relationship, LBL would have continued providing funding and product for Argent to sell.[36] It was uncontroverted that LBL's president gave verbal assurance to Argent after the parties' performance began that LBL was committed and "in the

---

[27] App. 67-69 (Larry Dahl Memo); App. 70-71 (LBL Responses to RFA).
[28] App. 72-74 (Wraith letter to Tom Wilson); App. 75-76 (LBL Response to 2nd set RFA 31,32,33,34,35,36,55– info. is true, reasonable and reliable).
[29] App. 65 (LBL Response to 1st set RFA 91).
[30] App. 65 (LBL Response to 1st set RFA 90).
[31] App. 66 (LBL Response to 1st set RFA 92).
[32] App. 60,62 (Coleman rollout presentation); App. 64-65 (LBL Response to 1st set RFA 68,82,83); App. 64 (2nd set RFA 67).
[33] App. 65 (LBL Response to 1st set RFA 83,89).
[34] App. 64-65 (LBL Response to 2nd set RFA 67,68; 1st set RFA 82,83).
[35] App. 113-114 (TR:227-Wraith).
[36] App. 115 (TR:397).

transaction."[37] Despite that, LBL in late December 1999, unilaterally drafted and sent Argent a "proposed agreement" which LBL admitted contained new and different terms not contained in the 1999 Letter Agreement. The proposed agreement was never signed.

LBL admits that it was true that as of January 18, 2000 [before their breach and after months of performance], LBL was considering three options which were to "discontinue our relationship;" "continue" the relationship with limitations"; or, to "continue our relationship with a full national program rollout with continued cash advances ...until the debt is repaid in full, at the end of 24 months...". App. 73-74. Wraith testified that LBL had received notice from Argent,[38] prior to LBL's default, that Argent believed they were operating under a binding agreement.[39] Regardless, Wraith testified that he called Argent on February 2, 2000, to "discontinue the arrangement".[40]

iv. LBL admits it kept its intent not to be bound a secret during the months of performance.

LBL admits not informing Argent until after January 15, 2000,[41] that LBL did not believe it was committed or obligated to fund $2,000,000 under the 1999 Letter Agreement.[42] It was uncontroverted that LBL instructed Argent to withhold a full public disclosure of the relationship until LBL cleared up some internal issues.[43]

---

[37] App. 137-140 (TR:1298-1301-Millar).
[38] App. 116-117 (TR:399-Wraith).
[39] App. 111.
[40] App. 114-115 (TR:267-Wraith).
[41] January 15, 2000, was an arbitrary date used in the admissions and not related to any specific occurrence but is after months of funding and bilateral performance.
[42] App. 80 (LBL Response to 1st RFA 161,162).
[43] App. 122 (Depo.-S.Watson); App. 143-145 (TR.1261-1264-Millar); App. 149-151 (TR:1325-1327-Millar).

v. LBL's admissions relevant to Argent's damages and damage calculations.

Numerous judicial admissions establish that Argent was not a speculative business.[44] LBL admitted knowing, as of at least January 12, 2000, that Argent had become dependent upon LBL's funding and that cutting them off from funding would put them in jeopardy.[45] LBL's judicial admissions and the uncontroverted evidence establish the parameters of the damage models before the court. Utilizing information that was judicially admitted, including the testimony of LBL's own president, the damage models reflecting damages ranged from $428,000,000 to more than $1,000,000,000, as recognized by the court in the Judgment.[46] These numbers are consistent with the projections that were a part of the 1999 Letter Agreement that projected Argent's value to be in excess of $400,000,000 after one year of implementing their business plan with LBL.[47] LBL's Vice President Dahl, a CPA and attorney, the one primarily responsible for dealing with Argent, testified LBL was comfortable with those numbers.[48] The parameters of the damages were established by judicial admissions and uncontroverted evidence.

F. Admissions conclusion.

The guiding principle of "Equal Justice Under Law" requires a procedure to be in place and to be honored by the lower courts that guarantees a litigant's right to depend upon the long established and clear precedents regarding judicially admitted, uncontroverted evidence, and the trial court's own order. A system of law without consistent

---

[44] App. 81-82 (LBL Responses to RFA).

[45] App. 67-69 (Larry Dahl Memo); App. 70, 80-81 (LBL 1st RFA 142,143,144,146,147,163,164; see also 150,151,152,167 re Dahl Memo).

[46] App. 6.

[47] App. 43.

[48] App. 117-118 (TR:558-559-Dahl).

application of the rules of law is not, and can never be, consistent with the due process requirements of the United States Constitution. Inconsistency harms not only the individual litigants but endangers for all the constitutionally guaranteed right to due process. Granting certiorari is necessary to correct this flagrant disregard for controlling precedent and denial of due process.

3. Certiorari should be granted because the courts failed to properly state and apply Nebraska law and such blatant disregard for well-settled legal precedent requires this Court's supervisory review.

A. Nebraska law must be applied in this case.

Federal courts in diversity cases, when deciding questions of substantive law, are bound by state court decisions and state statutes. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); The Rules of Decision Act, 28 U.S.C. § 1652 (1948). The courts apply the 'outcome determinative' test when there is a conflict between the Federal Rules of Civil Procedure and state substantive law. Hanna v. Plumer, 380 U.S. 460 (1965). A suit filed in federal court instead of state court should not lead to a substantially different result. Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

Further, in looking at the Federal Rules of Evidence, the issues of burden of proof and presumptions are at the heart of Rule 302. State rules controlling such matters as burdens of proof, presumptions, and sufficiency of evidence should be followed where they differ from the federal court's usual practice. Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 446 (1959). The appellate courts do not have to give deference to the district court's interpretation of state law and in fact should review such state law determinations *de novo*. Salve Regina College v. Russell, 499 U.S. 225, 240 (1991). This Court's review is required because the lower courts' opinions failed to recognize and apply well-settled Nebraska law as mandated by this Court and other legal precedent.

B. The lower courts failed to properly interpret and/or apply Nebraska law.

The trial court's opinion made numerous errors that were controlling as to the determination of whether the 1999 Letter Agreement was an enforceable contract. These errors center around the lower court's refusal to apply and properly state Nebraska law. Additionally, the trial court made numerous "findings" in its "findings of fact" which were irrelevant to controlling Nebraska law and/or completely void of support in the record and controverted the judicial admissions.

i. Nebraska law, if applied to the judicially admitted and uncontroverted historical facts would have established the 1999 Letter Agreement as an enforceable contract, as a matter of law.

The judicially admitted and uncontroverted facts establish the adequacy of the offer and acceptance. Overman v. Brown, 372 N.W.2d 102 (Neb. 1985); Restatement (Second) of Contracts § 54 (2)(b) (1981) . If the acceptance is communicated, a binding contract is established. Keller v. Bones, 615 N.W.2d 883, 887 (Neb. 2000). The lower courts ignored judicially admitted facts and controlling precedent. The 1999 Letter Agreement must be considered and construed together. Solar Motors, Inc. v. First Nat'l Bank of Chadron, 545 N.W.2d 714 (Neb. 1996). A contract should be construed in order to give effect to the contract as a whole. Barker v. Ceridian Corp., 122 F.3d 628, 637 (8th Cir. 1997). The lower courts ignored this precedent when interpreting the Letter Agreement.

LBL's admitted silence of their true intent while performing for months was a breach of their duty to disclose their true intent, thus creating an unfair advantage especially in light of LBL's admission of knowledge that Argent was dependent on LBL's funding.[49] Therefore, LBL

---

[49] App. 80-81 (LBL Response to 1st RFA 163, 164).

is estopped from asserting that the 1999 Letter Agreement was not a contract. Hanika v. Rawley, 368 N.W.2d 32, 35 (Neb. 1985).[50] The lower courts ignored this precedent and the consequences of LBL's admitted silence.

ii. The finding that the 1999 Letter Agreement was not an enforceable contract for "three reasons" was done by ignoring Nebraska law.

The trial court found the 1999 Letter Agreement was not an enforceable contract because of: (1) open terms; (2) no intent to be bound; and (3) the supersession doctrine. App. 18-21. These conclusions can only be made by ignoring judicially admitted and uncontroverted historical facts, and by refusing to apply or misstating Nebraska law.

a. The trial court failed to follow Nebraska law regarding necessary terms and the effect of performance.

Nebraska law states that performance waives the right to later claim relief from the contract based upon alleged open terms. See Nebraska Nutrients v. Shepherd, 626 N.W.2d 472 (Neb. 2001). The court found the absence of certain terms prevented the 1999 Letter Agreement from being an enforceable contract despite no such requirement under Nebraska law as to those terms.[51] In finding "open" terms, the trial court did so by ignoring the "four corners" of the 1999 Letter Agreement, (plead as a fully integrated contract), ignoring the judicially admitted facts, the months of trilateral performance, and refusing to apply controlling precedent. The refusal to apply fundamental Nebraska law was a denial of due process and an egregious error.

---

[50] See also, Scharman v. Scharman, 56 N.W. 704, 706 (Neb. 1893).

[51] See Entergy Services, Inc. and Entergy Ark., Inc. v. Union Pac. R.R. Co., 35 F. Supp. 2d 746, n.7 (D. Neb. 1999)(no requirement of a default clause).

b. The trial court in determining intent to contract ignored the judicially admitted objective evidence, which is controlling under Nebraska law.

Objective evidence of intent is controlling of the question of intent and performance is nearly always conclusive of a party's intent to be bound. Nebraska Nutrients v. Shepherd, 626 N.W.2d 472, 501 (Neb. 2001). Considering subjective evidence is improper. Tilt-Up Concrete v. Star City/Federal, Inc., 582 N.W.2d 604, 613 (Neb. 1998). Both lower courts knew the standard.[52] The trial court's Judgment is void of any references to the judicially admitted objective evidence of intent, and instead focuses on the irrelevant and immaterial subjective evidence. App. 6-23.

c. The trial court improperly interpreted the legal principal of supersession.

In order for the supersession doctrine to apply, the two agreements must involve the same parties and subject matter[53] and the agreements must be in place at the same time creating a conflict in the operation of the agreements.[54] None of these conditions were present. The parties were different,[55] the subject matter was different, and there was never a conflict in operation. On February 2, 2000,[56] before the February 2000 Agreement was signed, LBL refused further performance and therefore breached the 1999 Letter Agreement. The supersession doctrine is inapplicable.

---

[52] Acme Inv., Inc. v. Southwest Tracor, Inc., 911 F. Supp. 1261, 1269 (D. Neb.1995) aff'd, 105 F.3d 412 (8th Cir. 1997).

[53] Court recognized this in closing argument. App. 141-142.

[54] DeFillipps v. Skinner, 211 Neb. 801, 804 (Neb. 1982); see also Coop. Refinery Ass'n v. Consumers Public Power Dist., 190 F. 2d 852 (8th Cir. 1951).

[55] See Utilities Ins. Co. v. Stuart, 278 N.W. 827, 832 (Neb. 1938) ("A tripartite contract cannot be rescinded or modified without consent of all parties thereto").

[56] App. 151 (TR:1342-Millar).

Even if applicable, under the supersession doctrine there is no discharge of LBL's liability under the previous agreement unless that intent is clearly expressed in the new agreement. Caro, Inc. v. Roby, 342 N.W.2d 182, 186 (Neb. 1983). The Eighth Circuit previously recognized this principle of Nebraska law.[57] There is no such expressed intent in the February 2000 Agreement.[58] Even if applicable, supersession would only suspend the duty to perform under the prior agreement and not a party's liability for the prior breach. Coop. Refinery Ass'n v. Consumers Public Power Dist., 190 F. 2d 852, 855-858 (8th Cir. 1951). Although the court recognized these principles in closing argument it did not in the judgment.[59] Argent had a right to rely upon controlling Nebraska law and the courts' refusal to apply clear Nebraska law regarding supersession was a denial of due process and an egregious error.

iii. The lower courts methodology in finding the February 2000 Loan Agreement was an enforceable contract violated federal statutes.

The courts' errors relating to the February 2000 Agreement are numerous based upon the trial court's "findings of fact" which are unsupported by the record and based upon the courts' refusal to apply Nebraska law as mandated by Congress and this Court in diversity actions.[60] By way of example, under Nebraska law it was LBL's burden to plead and prove the agent's authority[61] especially as it relates to binding a principal for the repayment of

---

[57] Kort v. W. Surety Co., 705 F.2d 278, 282 (8th Cir. 1983).

[58] Court recognized no meeting of the minds. App. 140-142.

[59] The judge's comments in closing argument. App. 140-142.

[60] The Rules of Decision Act, 28 U.S.C. § 1652 (1948); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[61] Meier v. Geldis, 26 N.W.2d 813 (Neb. 1947); see also W. Fertilizer and Cordage Co., v. BRG, Inc., 424 N.W.2d 588, 593 (Neb. 1988); see also Elec. Dev. Co. v. Robson, 28 N.W.2d 130, 137 (Neb. 1947).

money.[62] The agent cannot establish his own authority.[63] Therefore, the lower courts' holdings are in square conflict with established Nebraska law. The proof of the agent's authority to bind eWealth was an essential element of LBL's *prima facie* case. Failure to prove the agent's authority would result in dismissal.[64] "[U]nder the Erie rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden during the instant trial." Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 446 (1959). This Court has held that federal courts in diversity of citizenship cases must apply state burdens of proof.[65] The court of appeals found that Argent, under Federal Rule of Civil Procedure 16, waived the issue of authority because it was not in the pretrial order. This finding is in square conflict with its own precedent that "if the defense involved is one that merely negates an element of the plaintiff's prima facie case ... it is not truly an affirmative defense and need not be pleaded...". Sanden v. Mayo Clinic, 495 F.2d 221, 224 (8th Cir.1974). Additionally, there is "nothing in Rule 16 Fed.R.Civ.P. or in the local rule involved here [that] suggests that a party waives or admits an issue as to which his opponent has the burden of proof by failing to include the issue in his pre-trial stipulated list of remaining issues."[66] The court of appeal's use of Rule 16 as a basis to refuse to review a question of substantive state law is a violation of the Rules Enabling Act, 28 U.S.C. § 2072. Section 2072 requires that rules of procedure "shall not abridge, enlarge or modify a substantive right." The court of appeals in failing to review whether or not LBL proved its *prima facie* case, by clear and convincing evidence, was a denial of Argent's statutory

---

[62] PWA Farms, Inc v. North Platte State Bank, 371 N.W.2d 102, 106 (Neb. 1985).

[63] Franksen v. Crossroads Joint Venture, 515 N.W. 2d 794, 801 (Neb. 1994).

[64] Pokorski v. McAdams, 285 N.W.2d 824, 827 (Neb. 1979).

[65] Palmer v. Hoffman, 318 U.S. 109 (1943).

[66] Pac. Indem. Co. v. Broward County, 465 F.2d 99, 103 -104 (5th Cir. 1972).

right to a meaningful appellate review and therefore a denial of due process of law.

iv. The trial court found ratification *sua sponte*.

The trial court found *sua sponte* that the February 2000 Loan Agreement was ratified although the issue of ratification was not plead, referenced in the Pre-trial Order, or argued at trial. Nebraska law states that, where the principal cannot make restitution without loss of that which it is entitled to keep, ratification does not result. Maixner v. Travelers Ins. Co., 276 N.W. 163, 166-167 (Neb. 1937).[67] The finding by the trial judge directly controverted judicial admissions, binding Nebraska precedent, the Pre-trial Order,[68] and Federal Rules of Civil Procedure. Regardless of the court's finding on ratification, the February 2000 Agreement had no effect on LBL's liability for breach of the 1999 Letter Agreement and LBL remains liable for its breach.

4. Certiorari should be granted because the lower courts failed to provide reasoned legal opinions required to safeguard due process, i.e. failed to address legal issues.

The three principles of "natural justice," as recognized by this Court, are that "'a man may not be a judge in his own cause,' that 'no party ought to be condemned unheard,' and that 'a party is entitled to know the reason for the decision'". Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951).

When the courts issue opinions without being accountable for the factual and legal reasoning of their decisions, a tremendous potential for judicial abuse exists. Due process can never be assumed but must be shown to have occurred. The right to rely upon a set of principles for the protection of one's life and property separates us from the rest of the world. What ensures that continued

---

[67] See also Restatement (Second) of Agency § 98, cmt c.

[68] App. 45-53.

separation is that the fundamental tenant of the Constitution, due process, be protected. Without due process of law being applied in a manner consistent with precedent, the system becomes one where each case may be freely given "outcome determinative deferential treatment" based upon an undefined, unknown, unpredictable, ever changing set of criteria.

"We understand as well as the next court how to...articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules logical consequences." TXO Prod. Corp. v. Alliance Res., 509 U.S. 443, 500 (1993). "Judicial opinions serve three functions. First, written opinions communicate a court's conclusions and the reasons for them to the parties and their lawyers. Second, when published, opinions announce the law to other lawyers, judges, academics, and the interested public. Finally, the preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support." Federal Judicial Center, Judicial Writing Manual, 1 (1991).

"The opinion should fairly, clearly, and accurately state the significant facts and relevant rules of law and demonstrate by its analysis the reasonableness of its conclusions. Misstating significant facts or authorities is a mark of carelessness or worse..." Id. It is "not enough that a decision be correct - it must also be fair and reasonable and readily understood. The burden of the judicial opinion is to explain and to persuade and to satisfy the world that the decision is principled and sound. What the court says and how it says it, is as important as what the court decides." Id. at vii. "A decision... can be accepted as completely just and fair only if the reasoning that supports it has been adequate, and the main relevant considerations have in fact been impartially weighed in the balance." Id. at 5. The courts

have a duty to write well-reasoned opinions that provide the litigants with a clear understanding of the basis of the court's decision; a duty which is essential for the protection of a litigant's right to due process.

5. Certiorari should be granted even though many of the egregious errors are not apparent on the "four corners" of the lower courts' opinions.

Silence can never be the guardian of due process. When a system of "justice" allows, condones and facilitates two systems of justice, one for cases decided through opinions demonstrating the court's well reasoned decision which address the legal issues and provide meaningful appellate review and another system for cases decided with unpublished opinions which fail on their face to state the factual and legal basis for the decision and make meaningful appellate review impossible, it is a system that cannot and will never guarantee its participants due process. Such a system makes the words due process simply a tool of those who are willing to manipulate due process to manipulate the outcome.

Unpublished opinions, while a recognized vehicle for the second system of justice, are nothing more than a vehicle. This court must decide, no, unfortunately must mandate, that in order for there to be a guarantee of due process of law, consistent with applicable precedent and rules, due process must be demonstrated by the courts in their opinions and judgments. Judgments must facilitate an understanding of not only the result but also the process. This case is an extraordinary example of the abuse of due process placing Petitioner in the position of asking the Supreme Court of the United States to answer these basic questions unaddressed by the lower courts:

- How could 137 affirmatively admitted Rule 36 admissions along with other judicially admitted facts which conclusively established the ultimate issues of this case, be ignored and controverted by the lower courts

opinions, despite the clear language of Rule 36 and the trial court's own order?

- Why did the lower courts fail to apply long standing controlling Nebraska law to the judicially admitted and uncontroverted material historical facts of this case?
- How was the trial court able to make "findings of fact" which are void of support in the record and/or irrelevant under controlling law?
- Why did neither court feel they had a duty or obligation to address the legal issues, in their opinions?

In this case neither court addressed the significant legal questions presented. If either had written an opinion which attempted to legally justify their refusal to honor controlling precedent, refusal to honor judicial admissions, refusal to apply long standing clear Nebraska law, and refusal to honor the trial court's order regarding the conclusive nature of judicial admissions, those opinions would not have survived under any standard of review.

The deprivation of due process is no less egregious because it is done silently, without any apparent reason or justification. The silence of opinions can never be a shelter for the deprivation of due process or a vehicle for making due process a lesser-protected right. Allowing the silent deprivation of a constitutionally protected right is the first step to the complete loss of that right. If the courts allow this silent deprivation then we know their answer to the following question. "If a tree falls in a forest and there is no one there to hear it, does it make a sound?" It is up to this Court to ensure that due process is applicable to all phases of the trial and appellate process. Due process is not just notice and an opportunity to appear but it is the right to have your position fully considered, studied and judged in light of controlling precedent and law. The honoring of the legal principle of *stare decisis* is essential to our system of justice and to due process of law. Anything less guarantees the perpetuation and growth of two systems of justice and

the guaranteed demise of the constitutionally protected right to due process of law.

Petitioner requests that this Court exercise its supervisory power so that due process is always a constitutionally protected right, whether its deprivation is apparent or not on the "four corners" of judicial opinions and whether or not the opinions are published or unpublished. Due process to a nation can only be guaranteed and protected one person at time.

6. Certiorari should be granted in order to ensure a litigants' right to receive the proper review under the appropriate standard of review.

The appellate court improperly applied the "clearly erroneous" standard of review. The appellate court ignored clear Nebraska law, which directs the standard of review when the facts are stipulated. This Court has held that the determination and effect of a stipulation is not a factual finding and is reviewed fully, just as is the determination of the meaning and effect of a contract.[69] Rule 36 admissions are the equivalent of stipulations of counsel. [70]

An appellate court should review a case with stipulated facts as if trying it originally in order to determine whether the facts warranted the judgment. Ray Tucker & Sons v. GTE Directories Sales Corp., 571 N.W.2d 64 (Neb. 1997); Jindra v. Clayton, 529 N.W. 2d 523 (Neb. 1995). The clearly erroneous standard is applied only if the historical facts are in question creating a true fact question. U.S. v. Gypsum Co., 333 U.S. 364, 394-395 (1948); Fed. R. Civ. P. 52 (a). Even so, "if a trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."

---

[69] Braxton v. U.S., 500 U.S. 344, 350 (1991).

[70] The Advisory Committee Notes to the 1970 amendment state that a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial.

Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 n.15 (1984).[71]

The material facts were established through judicial admissions and uncontroverted evidence and the proper standard of review was *de novo*. The failure to review *de novo* deprived Argent of its due process right to a full appellate review of the legal issues as guaranteed. Every litigant has the statutory right to appellate review and a right to that review subject only to the limitation of Federal Rule Civil Procedure 52 (a). This Court has a duty to protect this right to due process, this right to meaningful appellate review under the correct standard of review.

If this case is remanded to the Eighth Circuit, unless this Court resolves the conflicts in the interpretation and application of Rule 52 (a), the court is free to categorize the question as a mixed question, controlled by facts, and limit the review of many legal questions to "clearly erroneous" rather than *de novo*. The Advisory Committee Notes to the 1985 amendment recognize the need for "national uniformity" in the application of standards of review.

This artificial characterization of questions as mixed questions, a characterization that is not found in the statutes, has shown to be, not only an illusive and confusing target for the courts of appeal and the appellate bar, but a deceptive target that allows and facilitates the mischaracterization of issues in order to control or avoid both questions of fact and questions of law. This characterization allows manipulation of the case and an outcome determinative treatment of the standard of review.

The matters of law for the courts to determine, independent of the fact finder, are the identification of the legal issues, identification of the controlling law, interpretation of controlling law, and the application of law.

---

[71] See Steven Alan Childress & Martha S. Davis, 1 Federal Standards of Review § 2.16 (3d ed. 1999), for a discussion of fact findings based on legal error.

The right of a party to have these legal duties of the trial court reviewed fully by the appellate courts is at the very heart of due process and "equal justice under law". If the appellate court's duty to review legal errors is limited or restricted by the improper application of the "clearly erroneous" standard to anything except a "finding of fact" then an appellant is deprived of its right to due process, i.e. right to a full appellate review except for the specific limitation of Rule 52 (a). Each and every case, under the current standards utilized by the circuit courts, involves a question that can be categorized as a "'mixed question" of law and fact because every judgment requires that law be applied to facts. A "mixed question of law and fact" does by definition address an "issue that is neither a pure question of fact nor a pure question of law". Black's Law Dictionary, 266 (7th ed. 1999). Therefore any application of the clearly erroneous standard or the *de novo* standard will by definition be reviewing at least one half of the question under the wrong standard of review.

The appellate court in this case failed to follow this Court's mandate[72] by refusing to apply *de novo* review to the trial court's failure to apply the law to judicially admitted and uncontroverted facts. The Advisory Committee notes to the 1985 Amendment to Rule 52 recognize that "the Supreme Court has not clearly resolved the issue". The Supreme Court clarified in Ornelas v. U.S., 517 U.S. 690 (1996), that in mixed question of law and fact when the historical facts are admitted or established, it is a legal question, reviewed *de novo*.

The very heart of this question is will litigants who are in the same circumstance be treated in a consistent manner by the application of the same standard of review. By bifurcating the mixed questions into questions of law and fact the courts will avoid the inconsistent characterizations that have resulted from viewing the mixed questions

---

[72] Pullman-Standard v. Swint, 456 U.S. 273, n.19 (1982).

collectively which is subject to inconsistent characterizations and leads the courts to applying different standards to essentially identical cases thereby depriving the litigants of "equal justice under law".

This bifurcated inquiry "boils down a Rule 52 (a) inquiry into its basics in a way consistent with both the wording and the sprit of recent Supreme Court direction, as in Swint."[73] All else aside, any reasonable attempt at meaningful appellate review would reveal that under either standard, the opinions in this case strike an objective reviewer "with the force of a five-week-old, unrefrigerated dead fish...".[74] The confusion, inconsistency and manipulation of the standard of review has been a problem for more than 50 years. It is time to define and separate the two and review "fact finding" only under "clearly erroneous" as mandated by congress, and review those of law *de novo*.

CONCLUSION

Due process must guide each step of the trial and appellate process. If this court refuses to grant this Petition for Writ of Certiorari, such refusal will not be providing "precedent" but it will be providing a roadmap to every lower court that wishes to ignore the mandates of the Federal Rules of Civil Procedure, Federal Rules of Evidence, statutes, and controlling precedent. The protection of the constitutional right to due process requires that this right includes the right to have one's position considered thoughtfully in light of controlling rules, statutes, and precedent and to have that thoughtful consideration demonstrated in an opinion which makes understanding by all possible. Only then will the appellate courts' dockets be reduced, will results be predictable with reasonable

---

[73] Steven Alan Childress & Martha S. Davis, 1 Federal Standards of Review § 2.18 (3d ed. 1999).

[74] Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d.228, 233 (7th Cir. 1988), cert. denied, 493 U.S. 847 (1989).

certainty, will there be one system of justice affording due process to all. This Court has the opportunity to make certain that due process is never presumed in the face of silence and to correct, in this case, the egregious errors of the lower courts. It is the duty of the Supreme Court to ensure that "where there is a legal right, there is also a legal remedy...when ever that right is invaded,"[75] even if that legal right is invaded by the judicial system.

Respectfully Submitted,

Tom A. Dickens
DICKENS & ASSOCIATES
Texas Bar Number 05820800
Counsel of Record

Lisa J. Thiele
Texas Bar Number 24003044
DICKENS & ASSOCIATES
15840 FM 529, Suite 211
Houston, Texas 77095
Telephone: (281) 855-4100
Facsimile: (281) 855-6700
Attorney for Petitioners

[75] Marbury v. Madison, 5 U.S. 137, 163 (1803).

APPENDIX

I. EIGHTH CIRCUIT U.S. COURT OF APPEALS OPINION 3
II. DISTRICT COURT'S JUDGMENT 6
a. 1999 LETTER AGREEMENT 24
III. EIGHTH CIRCUIT ORDER DENYING REHEARING AND REHEARING EN BANC 44
IV. ORDER ON FINAL PRETRIAL CONFERENCE 45
V. ORDER BY THE DISTRICT COURT DENYING MOTION TO WITHDRAW FRCP 36 ADMISSIONS 54
VI. SKEETER COLEMAN PRESENTATION 57
a. TRANSCRIPT OF VIDEO PRESENTATION IN EVIDENCE WHICH SHOWED SPEAKER AND THE CD-ROM PRESENTATION 57
b. JUDICIAL ADMISSIONS RELATED TO SKEETER COLEMAN'S PRESENTATION INCLUDING THE CD-ROM PRESENTATION WHICH WAS PART OF HIS PRESENTATION AND IN EVIDENCE 63
VII. LARRY DAHL MEMO TO TOM WILSON 67
a. ADMISSIONS RELEVANT TO LARRY DAHL'S MEMO TO GENE WRAITH. 70
VIII. GENE WRAITH'S LETTER TO TOM WILSON REGARDING ARGENT 72
a. JUDICIAL ADMISSIONS RELEVANT TO GENE WRAITH'S LETTER TO TOM WILSON 75
IX. RULE 36 ADMISSIONS RELEVANT TO SPECIFIC TOPICS. 76
a. LBL'S KNOWLEDGE THAT ARGENT WAS SEEKING A PARTNER AND TIME WAS TIGHT ... 76
b. OFFER BY LBL MADE TO ARGENT 76
c. ACCEPTANCE 77
d. PERFORMANCE 78
e. LBL'S ADMISSION THAT THEY NEVER INFORMED ARGENT LBL'S DID NOT BELIEVE THEMSELVES TO BE BOUND TO THE TERMS OF THE LETTER AGREEMENT. 80
f. FORESEEABILITY AND CAUSATION 80

g. ARGENT WAS NOT A SPECULATIVE BUSINESS AND LBL'S OFFICERS' HAD FIDUCIARY DUTIES. 81
h. ADMISSIONS RELEVANT TO DAMAGE CALCULATIONS 82
X. FIRST SET OF REQUESTS FOR ADMISSIONS-BALANCE OF ADMISSIONS NOT DISPLAYED PREVIOUSLY IN APPENDIX 84
XI. SECOND SET OF REQUESTS FOR ADMISSIONS-BALANCE OF ADMISSIONS NOT DISPLAYED PREVIOUSLY IN APPENDIX 92
XII. THIRD SET OF REQUESTS FOR ADMISSIONS-BALANCE OF ADMISSIONS NOT DISPLAYED PREVIOUSLY IN APPENDIX 99
XIII. LBL's ANSWER TO COUNTERCLAIM BY ARGENT 103
XIV. EIGHTH CIRCUIT RULES FOR PUBLICATION 105
XV. FEBRUARY 2000 LOAN AGREEMENT 107
XVI. JANUARY 28, 2000 FAX FROM ARGENT TO LBL .. 111
XVII. GENE WRAITH TRIAL TESTIOMY 112
XVIII. LARRY DAHL TRIAL TESTIMONY 117
XIX. KENNETH LEHRER TRIAL TESTIMONY 121
XX. SAM WATSON TESTIMONY 122
XXI. CHRISTOPHER MILLAR TRIAL TESTIMONY 122
XXII. CLOSING ARGUMENT 140
XXIII. RICH TESTIMONY 142
XXIV. CHRISTOPHER MILLAR DIRECT 143

I. EIGHTH CIRCUIT U.S. COURT OF APPEALS OPINION

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-1782

Lincoln Benefit Life Company, Inc.,	*	
	*	
Appellee,	*	Appeal from the United States District Court for the District of Nebraska.
	*	
eWealth USA, Inc.; eWealth America, Inc.; Argent Capital Corporation; Argent Financial Services, Inc.,	*	[UNPUBLISHED]
	*	
Appellants.	*	

Submitted: October 11, 2002

Filed: October 18, 2002

Before McMILLIAN, BOWMAN, and SMITH, Circuit Judges.

PER CURIAM.

Following a bench trial, the District Court[1] found that Appellants (AFS/eWealth) breached a February 2000 credit agreement with Lincoln Benefit Life Company (LBL). AFS/eWealth had argued that its president, Sam Watson, did not have the authority to enter into the agreement. The District Court also found in LBL's favor with respect to AFS/eWealth's counterclaim that the parties formed a credit agreement in 1999 that LBL breached. AFS/eWealth now challenges the District Court's findings of fact with respect to the February 2000 contract and the alleged 1999 agreement. AFS/eWealth also argues that the District Court should have taken LBL's admissions as conclusive fact that a 1999 agreement existed and that the District Court improperly allocated the burden of proof to AFS/eWealth on the issue of Watson's lack of authority.

We review a district court's findings of fact, such as those concerning the existence of a contract, for clear error, see Kansas City Power and Light Co. v. Burlington Northern R.R. Co., 707 F.2d 1002, 1003 (8th Cir. 1983), and we review its findings of law de novo, see Appley Bros. v. United States, 164 F.3d 1164, 1170 (8th Cir. 1999). Having done so, we agree with the District Court, for the reasons it provided, that AFS/eWealth breached the February 2000 contract and that the parties did not enter into another contract in 1999 or at any other time.

As for the procedural disputes, we also agree with the District Court. First, the District Court did not err in construing LBL's admissions. Second, although AFS/eWealth argues that Watson lacked authority to enter into the February 2000 agreement, we agree with the District Court that, pursuant to Federal Rule of Civil Procedure 16(e), AFS/eWealth waived this issue by not raising it in the

---

[1] The Honorable Richard G. Kopf, Chief Judge, United States District Court for the District of Nebraska.

pretrial order. Relatedly, because AFS/eWealth waived its argument on the lack-of-authority issue, any dispute over the burden of proof concerning that issue is moot.

None of the District Court's findings of fact is clearly erroneous, and no error of law appears. We therefore affirm the judgment in favor of LBL on the basis of the District Court's thorough and well-reasoned opinion. See 8th Cir. R. 47B.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

II. DISTRICT COURT'S JUDGMENT

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC.,	)	4:00CV3130
Plaintiff,	)	
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
eWEALTH USA, INC., eWEALTH AMERICA, INC., ARGENT CORPORATION and ARGENT FINANCIAL SERVICES, INC.,	)	
Defendants.	)	

Plaintiff Lincoln Benefit Life Company, Inc. (LBL) claims the defendants breached a contract. The defendants' claim that the contract was procured under duress, was signed without proper authorization, and lacked consideration. The defendants also assert via counterclaim that LBL breached a prior contract, causing the defendants damage in an amount somewhere between $428 million and $1.1 billion. Following a bench trial on the merits of this case, I now issue my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a)[2],

---

[2] Any findings of fact more properly characterized as a conclusion of law, and any conclusion of law more properly deemed a finding of fact, should be so construed.

concluding that LBL should recover on its claim against the defendants, and that the defendants' claim against LBL is without merit. In particular, I find that no prior contract existed, as alleged by the defendants, and that the amount of damages due to Defendants, therefore, is not an issue.

I. FINDINGS OF FACT

1. Plaintiff Lincoln Benefit Life Company, Inc., (LBL) is a Nebraska insurance corporation with its principal place of business in Lincoln, Nebraska. (Filing 90, Order on Final Pretrial Conf. At 1 ¶ 1.) The defendants are Nevada corporations with their principal place of business in Tennessee. Argent Capital Corporation (ACC) is the parent company of the other defendants. Argent Financial Services, Inc., (AFS/eWealth) is a wholly-owned subsidiary of ACC that changed its name to eWealth USA, Inc, and again to eWealth America, Inc., subsequent to the events that are the subject of this lawsuit. (Id at 2 ¶ 3.) ACC and AFS/eWealth have separate bylaws, officers, and directors (See PX 86 & 94; DX 270 & 271.[3])

2. In 1999, AFS/eWealth believed it had developed a solid business plan centered around a "revolutionary" marketing concept that would allow a homeowner to take out an equity loan on his house, purchase a life insurance investment with the loan's proceeds, allow the life insurance investment to grow tax-free, and deduct for tax purposes the interest on the loan. (PX 37; PX 1000 (S. Watson Dep.) at 24-25.)

3. In June and August 1999, Sam Watson, AFS/eWealth's president and CEO, and Simon Baitler, an

---

[3] Plaintiff's exhibits shall b designated as "Px" and Defendants' exhibits as "DX" throughout this opinion.

AFS/eWealth consultant who was also a member of ACC's board of directors, discussed AFS/eWealth's business model with Allstate Insurance Company's Lou Lower. (PX 1000 (S. Watson Dep.) at 211-212; PX 1001 (Baitler Dep.) at 8-9.) Watson and Baitler also met with Gene Wraith, LBL's president and CEO, to whom Watson stated that the AFS/eWealth distribution system would consist of 30,000 agents who had previously done business with Watson. (Tr. 181, 183-84.[4]) At all times relevant to this litigation, LBL was a wholly-owned subsidiary of Allstate Life Insurance Company.

4. On approximately August 20, 1999, Baitler sent a letter to Lower listing certain aspects of a potential loan or credit line to be provided by LBL to AFS/eWealth. A copy of the letter was also sent to Wraith. The first line of the Baitler letter stated: "The purpose of this letter is to make sure I heard you correctly as to the conditions under which Allstate would provide $2,000,000 by way of a credit line to AFS as part of an overall relationship," Baitler concluded his letter by stating: "I hope the above meets with you[r] approval... If you are happy to proceed on the above outlined basis, I would appreciate it if you would signify your acceptance in concept by signing the bottom of this letter and returning it to me." (Ct.'s Ex. 1, at 000263-000265[5]" (emphasis added).)

5. Wraith testified that upon receipt of Baitler's letter, he may have scanned the letter, but he did not discuss it with Lower and he did not act upon it. (Tr. 187 & 190.) Two weeks later, Wraith received an "urgent call, a call of necessity" from Baitler and Watson, who told Wraith they

---

[4] References to "Tr." Designate testimony contained in the trial transcript.

[5] Court's Exhibit 1 is attached to these Findings of Fact and Conclusions of Law and is incorporated herein by this reference.

had an upcoming board meeting and "needed some documentation, something to take to their board of directors that could demonstrate that they were in discussions with one or more insurance carriers." (Tr. 188.) Baitler and Watson asked Wraith to help them by "please [signing] the letter." (Tr. 190.) Accordingly, Wraith signed and initialed Baitler's letter on September 3, 1999. (Ct.'s Ex. 1, at 000263-000265.)

6. Wraith viewed the letter as something "conceptual in nature." (Tr. 190-91.) Wraith knew and believed that the parties would still need to negotiate and document all of the details of any agreements in a series of separate contracts - one contract relating to AFS/eWealth's marketing of LBL products, and additional contracts relating to money to be loaned from LBL to AFS/eWealth via a credit line facility. (Tr. 197 & 199.) Likewise, Baitler knew that "a final definitive agreement had to come." He understood that numerous issues remained open for future negotiation. (PX 1001 (Baitler Dep.) at 28, 49-50.) Sam Watson considered Baitler's letter as a list of "deal points," not "an actual contract." He saw the letter as a "concept" that could lead to a more formal loan or credit facility agreement in the future. (PX 1000 (S. Watson Dep.) at 212-14, 231-32, 291-92, 298-99, 323.) After Wraith had initialed and signed the August 20, 1999 letter, Watson specifically asked Wraith when the parties "will...have a final agreement." (Id at 301.) Wraith advised Watson that LBL's attorney would later draft the final contract. Watson, in turn, asked AFS/eWealth's lawyer, Winston Evans, to "look over everything and verify it before we have a final deal." (Id at 301-02.)

7. On August 23, 1999, ACC's board of directors - including Christopher Millar, Sam Watson, and Simon Baitler - convened a meeting via telephone. The minutes from that meeting refer to discussion regarding "negotiations" between Argent, Allstate, and its subsidiary,

LBL. The minutes and term sheet indicate that as part of a "proposed relationship" with Argent, LBL was "prepared to provide by way of line of credit $2 million dollars" under certain terms, including use of a preferred convertible note at an interest rate "[t]o be agreed" with drawings to occur pursuant to a "pre-agreed" schedule for a term of two years, and requiring repayment of the note in full at the end of the term unless, among other things, Argent repaid the drawn amount via "bonus dollars through exceeding the pre-agree[d] performance schedule." Security was to be provided by a negative pledge deed and a "guarantee" by ACC. Another document entitled "Lincoln Benefit Life Finance proposal Plan" indicates eWealth's proposal that LBL's loan be convertible into equity in eWealth at LBL's option at "an interest rate equivalent to the minimum amount required by the I.R.S. (We believe 6%)." (Ct.'s Ex. 1, Docs. 2-5.)

8. In October 1999, LBL advanced funds to AFS/eWealth to help it get its operation off the ground while the parties continued their negotiations. Wraith made these advances because he was interested in AFS/eWealth's proposed distribution system and because Watson and Baitler told him the opportunity would be lost unless funds were sent. (Tr. 224-25.) Wraith believed he could recover the advanced money through commissions earned by AFS/eWealth agents selling LBL insurance products. (Id at 248&264.)

9. On November 15, 1999, ACC filed with the Securities and Exchange Commission (SEC) a Form 10-QSB, which was signed by Christopher Millar, ACC's president and CEP. (PX 86.) In its Form 10-QSB, ACC expressly stated that neither it nor AFS/eWealth, its wholly-owned subsidiary, had any binding funding commitment from LBL or anyone else:

> It is anticipated that eWealthUSA will have a negative cash flow from operations during the next five months and perhaps longer... Cash required to fund operations during the next quarter is projected to be in excess of $1 million. Funding is expected to be provided by investors and by strategic partners, such as providers of various financial productions to be sold through eWealthUSA, but eWealthUSA and the Company do not presently have any binding commitments for funding.

(Id at 13 (emphasis added).)

10. In December 1999, LBL legal counsel Carol Watson retained a law firm to draft definitive contracts that would govern the parties' relationship. (Tr. 89-90.) She then sent those draft contracts to Sam Watson for his review. (PX 14.) Sam Watson reviewed LBL's draft contracts, signing only LBL's proposed marketing agreement. (DX 166.) Sam Watson forwarded the remaining three draft contracts to Baitler and Winston Evans, AFS/eWealth's attorney. (PX 1001 (Baitler Dep.) at 29-30.) After consulting with Sam Watson and Baitler, Evans forwarded AFS/eWealth's comments and proposed modifications to Carol Watson. Evans' letter purported to summarize AFS/eWealth's "concerns and issues" with LBL's proposal. (PX 15.) While Evans' letter objected and suggested changes to various provisions in LBL's draft contracts, he never stated or suggested that there was some type of pre-existing contract between AFS/eWealth and LBL, noting only that some of LBL's proposed terms were inconsistent with parties' prior "discussions." (Id) Carol Watson had a telephone conference with Sam Watson and Evans on December 30, and at no time did either refer to a prior loan contract between the parties. (Tr. 91; PX 67.) Carol Watson testified that there "was

absolutely no reference, no new answer, no nothing. I mean, there was absolutely nothing at all that was said that could imply... or be more direct that there was any kind of a written or oral agreement that preceded these discussions." (Tr. 103.)

11. By late January 2000, AFS/eWealth still had not executed any of the three draft contracts proposed by LBL relating to the loan/credit line. At that time, Sam Watson began to feel that the deal was no longer palatable, and Wraith decided not to go forward with the relationship for a variety of reasons, including AFS/eWealth's failure to produce any results. (Tr. 265-66, 490.) Wraith informed Sam Watson of LBL's decision not to proceed with the credit line facility. (PX 1000 (S. Watson Dep.) at 44-46; Tr. 267-68.)

12. Sam Watson and Baitler then asked Wraith for additional funds to enable AFS/eWealth to "get to another company." (PX 1000 (S. Watson Dep.) at 45-46; PX 1001 (Baitler Dep.) 38,59; Tr. 268-71) AFS/eWealth wanted a $200,000 "bridge loan" to enable the company to continue operations until it found another lender that was willing to provide more substantial funding to AFS/eWealth. (PX 1000 (S. Watson Dep.) at 46-47; Tr. 270.) Wraith agreed to AFS/eWealth's request, and offered to provide AFS/eWealth an additional $200,000. (Tr. 270-71.)

13. On or about February 3, 2000, LBL and AFS/eWealth entered into a written loan contract (the "February 2000 Loan Agreement"), which was executed by Sam Watson at AFS/eWealth's president and CEP, and Larry Dahl, LBL's executive vice president, (PX 22.) In the Loan Agreement, the parties acknowledged that their "negotiations in 1999 and January 2000 regarding a potential marketing plan" had ended "with a decision that [AFS/eWealth would] not implement such marketing plan

with LBL, but instead [would] search for another insurer to implement such marketing plan." (PX 22 ¶¶ 3, 4, 7.)

15. Shortly after execution of the February 2000 Loan Agreement, Chris Millar, Chairman of AFS/eWealth's parent corporation, ordered AFS/eWealth's chief financial officer to "let all the employees go, close the office, and send [Millar] all the checkbooks." (PX 1000 (S. Watson Dep.) 72-74.) Millar's order comes while Sam Watson was out of town. Things became more hostile, and Watson resigned on March 8, 2000. (Id at 57-68; Tr. 1474.)

16. Under the terms of the February 2000 Loan Agreement, LBL's Loan Agreement, LBL's loan to AFS/eWealth became immediately due and payable upon Sam Watson's resignation. (PX 22 ¶ 7.) LBL requested that the loan be repaid, which AFS/eWealth refused to do. (Filing 90, Order on Final Pretrial Conf. at 2 ¶ 8; Tr. 1335.) On May 17, 2000, LBL filed this lawsuit against AFS/eWealth and its parent company, ACC, to recover the $675,000 lent to AFS/eWealth. LBL claims that, with interest, the amount AFS/eWealth owes LBL was $760,500 at the time of trial. (Tr. 494-95.)

II. CONCLUSIONS OF LAW[6]

---

[6] I have determined - and the parties agree - that Nebraska law applies to this dispute. A federal court sitting in diversity applies the choice-of-law rules of the state in which it sits, and Nebraska has adopted the Restatement (Second) of Conflict of Laws, Inacom Corp. v. Sears, Roebuck & Co. 254 F.3d 683, 687 (8th Cir. 2001) (applying Nebraska law). The rights and liabilities of a corporation with respect to a third person are determined in the same manner as for non-corporate parties. Restatement (Second) of Conflict of Laws § 301 (1969). In particular, "[w]hether a corporation is bound by an act done on its behalf is determined by the law selected by application of the rule of § 292." Id cmt. a. Section 292 states that the local law of the state where an agent dealt with a third person is used to determine whether the principal is bound. Id § 292.

A. The February 2000 Agreement

It is undisputed that under the terms of the February 2000 Loan Agreement, all amounts loaned under that agreement became due and payable when Sam Watson resigned from his "responsibilities of the President and Chief Executive Officer" of AFS/eWealth. (PX 22 ¶ 7) and that AFS/eWealth has not repaid any funds due under that agreement. What is disputed is whether the February 2000 Loan Agreement is unenforceable because it was procured under duress, was signed without proper authorization, or lacked consideration, as the defendants claim.

1. Duress

For an agreement to be voidable as the result of economic duress, the defendants must prove that the agreement was obtained "by means of pressure brought to bear," First Data Resources, Inc. v. Omaha Steaks Int'l, Inc. 307 N.W.2d 790 (1981)—that is, pressure "as will compel a man to go against his will, and takes away his free agency, destroying the power of effusing to comply with the unjust demand of another." Carpenter Paper Co. v. Kearney Hub Publ'g Co., 78 N.W.2d 80, 84 (Neb. 1956)(internal quotation marks omitted). Further, the defendants must prove that the resulting agreement is "'unjust, unconscionable, or illegal.'" Lustgarten v. Jones, 371 N.W.2d 668, 672 (Neb. 1985)(quoting Carpenter Paper Co., 78 N.W.2d at 84). "'The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon...the threat to do that which the demanding party has a legal right to do.'" Id.

In this case, the agent, Sam Watson, dealt with the third party, LBL, in Nebraska. Watson traveled to LBL's office in Nebraska during the negotiations (PX 1000 (S. Watson Dep.) 106-07) and draft agreements originated from and were exchanged in Nebraska (PX 14; PX 31.)

Courts have made clear that voiding an agreement on grounds of economic duress is rare where, as here, the agreement involves sophisticated commercial parties. See Mirax Chem. Prods. Corp. v. First Interstate Comm. Corp., 950 F.2d 566, 570 (8th Cir. 1991)("Merely driving a hard bargain or taking advantage of another's financial difficulty is not duress).

The defendants have failed to meet their burden to prove both of the elements of duress. The parties in this case entered into the "bridge loan" portion of the February 2000 Loan Agreement, in part, because Sam Watson and Simon Baitler asked LBL to do so—Watson and Baitler requested a bridge loan to enable them to pursue funding negotiations with other insurance providers. Further, if the defendants truly believed that LBL was reneging on a prior agreement, it had the option of seeking legal relief at that time instead of entering into another agreement. See Restatement (Second) of Contracts § 175 cmt. b, at 476 (1981) (threats do not amount to "duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it...The alternative may take the form of a legal remedy."). The defendants also had the realistic option of pursuing other financing opportunities, rather than continuing to deal with LBL.[7] Finally, there is no evidence of a coercive, wrongful act on the part of LBL in order to force the defendants into signing the February 2000 Loan Agreement. To the contrary, LBL reasonably insisted upon the execution of a document that would finally and definitively set the terms of a loan or credit

---

[7] AFS/eWealth's former president testified that in February 2000 there were other companies, such as BMA based in Kansas City, that were interested in funding AFS/eWealth. (PX 1000 (S. Watson Dep.) at 46 & 53; Tr. 268-69.) Simon Baitler, an ACC board member, also testified that he believed Watson would have found alternative financing if ACC's chairman, Chris Millar, had not forced Watson to resign. (PX 1001 (Baitler Dep.) 64-65.)

line agreement with the defendants that had been under negotiation for several months.[8] Thus, the February 2000 Loan Agreement is not voidable by reason of duress.

2. Authority to Sign Agreement

The defendants argue that Sam Watson, AFS/eWealth's president and CEO, lacked authority to enter into the February 2000 Loan Agreement. Because Defendants failed to designate this issue as one remaining for disposition at trial in the Order on Final Pretrial Conference, Defendants have waived this issue. (Filing 90, at 4-5.) Fed. R. Civ. P. 16(e) (pretrial order governs subsequent course of action unless modified to prevent manifest injustice). In any event, the defendants' argument is not persuasive.

"An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act." Franksen v. Crossroads Joint Venture, 515 N.W.2d 794, 801 (Neb. 1994). An agent has authority to act on behalf of a principal "in accordance with the principal's manifestations of consent" that the agent "should act on account of the principal." Restatement (Second) of Agency §

---

[8] In any event, AFS/eWealth's subsequent conduct ratified the February 2000 Loan Agreement and precludes it from attempting to avoid the contract. Under Nebraska law, if a party accepts the benefits flowing from a contract and does not promptly repudiate it, it has ratified it. Bauermaister v. McReynolds, 571 N.W.2d 79, 89 (Neb. 1997) (a party seeking to rescind a contract on the ground of business coercion or economic duress "must do so promptly upon the discovery of the facts giving rise to the right to rescind"), modified on other grounds, 575 N.W.2d 354 (1998). AFS/eWealth did not promptly return to LBL the $200,000 it borrowed under the February agreement or any of the money it previously borrowed. By accepting LBL's money, AFS/eWealth has ratified the parties' February 2000 Loan Agreement and is bound by its terms.

7 & cmt. a, at 28 (1958). Those manifestations of consent may be made by words of conduct, expressly or by implication. An agent's powers may be implied or inferred from words used or from customs and relations of the parties. Id § 7 cmt. c. See Bury v. Action Enterprises, Inc., 246 N.W.2d 724 (Neb. 1976)(fundamental rule of agency law is that principal is bound by acts which agent does within the actual or apparent authority from the principal; citing Restatement (Second) of Agency for related proposition); Martin v. St. Paul State Bank, 266 N.W. 762 (Neb. 1936) (vice-president of bank cannot bind bank without authority granted by board of directors or without established usage acquiesced in by the board).

Here, Sam Watson, president and CEO of AFS/eWealth, received specifically expressed authority from the board of directors to sign the February 2000 Loan Agreement. Watson testified that he obtained the express approval and agreement of the board of directors before he entered into the agreement, and Simon Baitler—an AFS/eWealth consultant who was also a member of ACC's board of directors—testified that Sam Watson spoke with all of the directors, who told Sam Watson to sign the agreement. (PX 1000 (S. Watson Dep.) at 91-92, 319-20; PX 1001 (Baitler Dep.) at 44.)

Further the board of directors' custom and practice was to allow Sam Watson to sign contracts. The evidence establishes that Sam Watson signed a number of contracts on behalf of AFS/eWealth, including at least ten contracts to purchase AFS/eWealth's technology and software, as well as Baitler's consulting agreement. There is no evidence of board approval for such contracts, and the defendants do not dispute the validity of those contracts. (Tr. 1353-57.)

3. Consideration

Consideration is any benefit to the promissor or any to the promissor or any detriment to the promissee. Kissinger v. Genetic Evaluation Center, Inc., 618 N.W.2d 429, 436 (Neb. 2000). "The monetary value of the performance or the promise of the performance is irrelevant. It is sufficient that the promissee did something he or she was not otherwise required to do or that the promissor received something he or she was not otherwise entitled to receive." Pruss v. Pruss, 514 N.W.2d 335, 345 (Neb. 1994).

The February 2000 Loan Agreement comprised a classic exchange of promises; LBL promised to loan AFS/eWealth $675,000—some of which had already been advanced—in exchange for AFS/eWealth's promise to pay the money back with interest. AFS/eWealth suggests that there was no consideration to support the February 2000 Loan Agreement because the parties' alleged 1999 agreement already required LBL to lend AFS/eWealth $675,000, and a promise to perform an existing duty is not adequate considerations. Because the defendants did not have a loan contract with LBL in 1999, as discussed below, I find the defendants' consideration argument to be without merit.

B. The Alleged 1999 Letter Agreement

The defendants seek damages of up to $1.1 billion against LBL for breach of a contract the defendants characterize as the "1999 Letter Agreement," which consists of a hodgepodge of documents pieced together from various office files provided by the parties in this case. (Ct.'s Ex. 1.) I conclude that the "1999 Letter Agreement" is not an enforceable contract for three reasons.

First, the idea that a contract between the parties was formed in 1999 is inconsistent with the existence of the 2000 Loan Agreement, which was a contract between the same parties concerning the same subject matter. Even if such a

contract had been formed in 1999, the 2000 Loan Agreement would have superseded it. "A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former so that they cannot subsist together." Hasenauer v. Durbin, 346 N.W.2d 695, 698 (Neb. 1984) (internal quotation marks omitted); Caro, Inc. v. Roby, 342 N.W.2d 182, 186 (Neb. 1983) (same); The Nebraskans, Inc. v. Homan, 294 N.W.2d 879, 881 (Neb. 1980) (same). Here, the February 2000 Loan Agreement—a contract complete in and of itself—would have superseded what the defendants call the 1999 Letter Agreement, which was made between the same parties concerning the same subject matter and which was inconsistent in its main terms[9] with the 2000 Loan Agreement.

Second, what the defendants characterize as the 1999 Letter Agreement cannot be considered a contract due to the insufficiency of its main terms. Because numerous issues were left open for further negotiation by the parties during 1999, no contract could have existed at that time. Solar Motors, Inc. v. First Nat'l Bank of Chadron, 545 N.W.2d 714, 720 (Neb. 1996) (no contract can be formed "[w]hen the provisions of an alleged contract being sued upon are so cursory, indefinite, and conditional as to fail...to establish an objective intent on the part of the parties to be bound there[to]"); Western Sec. Bank v. United States Fidelity & Guaranty Co., 539 N.W.2d 15, 18 (Neb. 1995) (same). "Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary

---

[9] The terms in the alleged 1999 Letter Agreement regarding the loan amount interest rate, term of the loan, and repayment schedule are either different from those found in the 2000 Loan Agreement or are too vague to be compared to the 2000 agreement.

negotiation." Fleming Co. of Nebraska, Inc. v. Michals, 433 N.W.2d 505, 508 (Neb. 1988) (internal quotation marks omitted). A party seeking to recover for breach of contract must demonstrate the existence of a definite offer. Sayer v. Bowley, 503 N.W.2d 166, 169 (Neb. 1993); Viking Broad. Corp. v. Snell Publ'g Co., Inc., 497 N.W.2d 383, 386 (Neb. 1993). The terms of an offer must be "reasonably pertain" for an enforceable contract to result from an offer and acceptance, and "[t]he fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer." Restatement (Second) of Contracts § 33(1) & (3). The more terms that are left open or incomplete, the less likely it is that the parties have intended a binding agreement. Id. cmt. c.

The collection of documents contained in Court's Exhibit 1 leaves open several crucial terms whose specification is essential for any binding contract to loan money; (1) the interest rate on the loan is variously described in the 1999 documents as "the minimum amount required by the IRS," "[t]o be agreed" upon, and "the minimum amount required by the I.R.S. (We believe 6%),"[10]; (2) the dates upon which the loan term would begin and end are unspecified; (3) when, how, and under what terms repayment would

---

[10] The references to the minimum amount required by the IRS does not provide any definiteness to this key term. The applicable federal rate set by the IRS changes on a monthly basis, 26 U.S.C. § 1274(d)(1)(B) (Cum. Supp. 2001), and Millar admitted that he did not know the interest rate that would apply when the parties exchanged documents in September. (Tr. 1375-76.) Further, the defendants admitted through counsel during closing argument that it was not clear in the documents whether the rate at the time of the first drawing would apply to all drawings or if the rate in effect at the time of each drawing would apply to that drawing. (Tr. 1630.) In addition, the IRS rate is actually compound, while Millar believed that the "agreed upon" rate was simple interest. See 26 U.S.C. § 7872(f)(2) (Cum. Supp. 2001). (Tr. 1387-88.)

occur is an open term; (4) the benchmarks AFS/eWealth would have to satisfy as a precondition to drawing on this performance-based loan or line of credit are not stated; (5) LBL's rights upon default were left open for future negotiation; and (6) the documents refer, without any specific terms, to LBL's option to convert its loan into equity in AFS/eWealth, an option in which LBL had no interest (Tr. 203-04 & 613). (PX 1000 (Sam Watson Dep.) at 291-92, 298-99, 323 (stating terms upon which agreement had not been reached)).

Finally, the parties' words, actions, and statements between September 1999 and February 2000 establish that they understood no binding contract was in place. In November 1999, ACC filed a Form 10-QSB with the Securities and Exchange Commission specifically stating that neither AFS/eWealth nor ACC had any binding funding commitment from LBL or anyone else. (PX 86, at 13.) ACC also filed an update with the SEC in March 2000, but did not change its prior filing with regard to the lack of any funding commitment. (PX 80.) Such objective manifestations of the parties are highly probative to show their intent not to be bound by any alleged contract prior to the February 2000 Loan Agreement. Tilt-Up Concrete. Inc. v. Star City/Federal, Inc., 582 N.W.2d 604, 610 (Neb. 1998); Cimino v. Firstier Bank, N.A., 530 N.W.2d 606, 615 (Neb. 1995).

Therefore, no contract between the parties existed prior to the February 2000 Loan Agreement, and the defendants cannot recover against LBL on their counterclaim for breach of an agreement reached prior to that time. Therefore, it is unnecessary to address the defendants' counterclaim for damages.

III. CONCLUSION

The defendants breached its February 3, 2000 Loan Agreement with plaintiff Lincoln Benefit Life Company, Inc., by failing to repay LBL the $675,000 loaned to Defendants under such contract, with interest, at the time the loan became due and payable—that is, the date that Samuel B. Watson ceased to hold the title of and/or perform the responsibilities of president and CEO of AFS/eWealth. Therefore, judgment shall be entered in favor of Plaintiff LBL and against Defendants on Plaintiff's breach-of-contract claim in the amount of $675,000, plus interest as accrued under the terms of the February 2000 Loan Agreement (PX 22) to the date of judgment.[11]

Further, judgment shall be entered against the defendants, and in favor of the plaintiff, on the defendants' counterclaim that LBL breached a contract that allegedly existed between the parties prior to February 2000.

IT IS ORDERED:

1. Judgment shall be entered by separate document in favor of Plaintiff Lincoln Benefit Life Company, Inc., and against Defendants on Plaintiff's breach-of-contract claim in the amount of $675,000, plus interest at the rate of 8% per annum beginning on February 1, 2001, to and

---

[11] The Loan Agreement signed on February 3, 2000, creates a potential ambiguity about when interest began to accrue. (PX 22.) Paragraph 3 of the Agreement states that the loan "shall be interest-free for the first twelve (12) months of the term. Beginning with the thirteenth (13th) month and until the end of the term, the Loan shall bear interest at the rate of eight percent (8%) per annum." Paragraph 7, which lists the events that make the loan "immediately due and payable," does not indicate that such events trigger the accrual of interest or somehow revise the interest-free-for-12-months provision. Therefore, the court finds that the interest in the amount of 8% per annum began to accrue under the terms of the February 3, 2000 Loan Agreement beginning in the thirteenth month of the loan term – that is February 1, 2001.

including the date of judgment, plus post-judgment interest and taxable costs as provided by law;

2. Judgment shall be entered by separate document against Defendants, and in favor of Plaintiff, on Defendants' counterclaim that Plaintiff breached a contract that allegedly existed between the parties prior to February 2000;

3. Defendant's Objections to Plaintiff's Exhibits (filing 99), which is shown as a pending motion on the court's computerized record-keeping system, is denied as moot in light of the court's rulings on the parties' objections to exhibits during trial;

4. Argent's Motion in Limine (filing 104) is denied as moot, as the court disposed of all motions in limine as they were asserted during the nonjury trial of this matter;

5. Plaintiff's Motion to Bar and/or Strike the Testimony of Harold Ingraham (filing 110) is denied as moot because the court did not consider on rely on such testimony in reaching its decision; and

6. The objections contained in the following depositions are overruled: PX 1002 (Dep. Stephen P. Dicke); DX 1003 (Dep. Gary Kenneth Brown); DX 1004 (Dep. Mark Kennison); DX 1005 (Dep. Robert E. Rich); DX 1006 (Dep. Tom Wilson); DX 1007 (Dep. Winston S. Evans); DX 1008 (Dep. Louis G. Lower).

a. 1999 LETTER AGREEMENT

To: Lou Lower
cc: Gen Wraith, Chris Millar, Sam Watson
From: Si Baitler
Re: Allstate/Argent Financial Services (AFS) relationship

The purpose of this letter is to make sure I heard you correctly as to the conditions under which Allstate would provide $2,000,000 by way of a credit line to AFS as part of an overall relationship. I also wanted you to know of our actions and reactions to those conditions.

1. AFS is to start selling Allstate products even before the anticipated 1/1/00 total program kickoff.[12] BEW

2. AFS is to develop a schedule as to the drawings required under the credit line on a quarterly basis. This schedule is to include details as to how these funds are to be used. Quarterly benchmarks are to be provided as a guide to the success or other wise of the venture. Providing these benchmarks are met (and agreed upon[13])Allstate will continue to fund AFS in accordance with the terms of the credit line facility BEW

A copy of our existing cash flow forecast and cash requirements for AFS is attached. These forecasts have been prepared on a very conservative basis, assume no further capital cash contributions to AFS and are in some great detail. Sam will be glad to review the detail with you or anyone else you want. Naturally, some of the

---

[12] "BEW" at the end of side of each paragraph are the initial of Gene Wraith which he added, long with the changes and signature before it was returned to Argent.

[13] Information in ( ) represents hand written changes made by Gene Wraith

expenses are fixed, but some are variable depending on recruitment success and production.

3. AFS will arrange for you to speak directly with the appropriate ~~chase~~ (funding organization) executive as soon as practical ~~next week~~[14]. BEW

4. AFS will give you assurances that the funds advanced will be expended only on meeting the working capital requirements of AFS. BEW

5. AFS is to provide protection from the business risks associated with the general business of Argent Capital Corporation. This is to protect both the god name and standing of Allstate and to protect your investment by way of advances made under the credit facility. BEW

Argent Capital proposes to spin AFS off into a stand-alone publicly listed corporate entity. The filing of the appropriate documentation (SB10) and approval by the SEC will take approximately 3-4 months. In the interim we propose the following:

- The credit line facility will be entered into between ~~Allstate~~ (/LBL)[15] and AFS.
- The credit line facility will be guaranteed by Argent Capital corporation and would grant Allstate a charge over all the shares of AFS until the earlier of;
    1. The repayment in full of the credit line facility, or
    2. the completion of the above referred spin off.

---

[14] Strike thoughts are hand changes and ( ) are changes inserted by hand by Gene Wraith.

[15] Strike though is a hand made change and the bracketed information was inserted manually by Gene Wraith

As AFS is not part of the Argent Capital Corporation charging group, there can be no possibility that creditors of Argent Capital could demand the cash committed to AFS to be used to satisfy outstanding debts of the Argent Capital. In fact, in an Argent Capital default situation Allstate could protect itself by exercising its rights under the credit line facility and hold the shares of AFS directly until all outstanding debt under the credit line was repaid I full.

You also asked AFS to propose an acceptable financing structure.

AFS proposes that the funding be provided pursuant to a Preferred Convertible Note (PCN) Facility. The terms of the note would allow for scheduled drawings to occur up to the facility amount i.e. $2,000,000. The drawings would attract an interest rate equivalent to the minimum amount required by the IRS. The loan intervals over the term of the facility i.e. 2yrs. The debt could covert at predetermined rates such that the earlier the date of the conversion, the better the conversion rate.

Should AFS exceed predetermined sales targets by specified margins, AFS would earn bonus dollars which could only be used to retire the debt under the credit line. In this was, both parties are motivated. AFS will be motivated to exceed projections so as to retire as much debt as possible while Allstate will be motivated to convert as much debt to equity as quickly as possible to enjoy the equity upside.

So long as any funds remained outstanding under the credit line facility or Allstate owned more than five percent of the outstanding shares of AFS, AFS would make available one board seat to Allstate.

I hope the above meets with you approval. Should you have any questions please call me. (I am scheduled to speak with

you on Tuesday at 10:30 your time.) If you are happy to proceed on the above outlined basis, I would appreciate it if you would signify your acceptance in concept by signing the bottom of this letter and returning it to me.
Best Regards,

Simon C. Baitler

(B. E. Wraith [printed]
Followed by Gene Wraith's signature]
9-3-99)[16]

---

[16] This is the signature block where Wraith printed his name, added his signature and then the date. Wraith was Allstate's president

ACTION BY THE UNANIMOUS WRITTEN CONSENT

OF THE BOARD OF DIRECTORS OF

ARGENT CAPITAL CORPORATION

The undersigned, being the majority of the directors duly elected and entitled to consent, do hereby approve, consent to and adopt the following resolution in accordance with the bylaws of Argent Capital Corporation, a Nevada Corporation (the "Company"), and applicable law:

WHEREAS, the board of directors of the Company (the "Board") desires to enter into a strategic partnership with Allstate Life Insurance Company and/or its subsidiary, Lincoln Benefit and Life (Allstate).

WHEREAS, Allstate will provide to Argent Financial Services (AFS) insurance product required by AFS to support its business lines and products.

WHEREAS, AFS requires a credit facility of $2 million dollars to provide funding for the continued operation and development of AFS and the board of the company wishes to provide security and assurances to Allstate for the provision of such a credit facility.

NOW, THEREFORE BE IT RESOLVED, that the board hereby approves each and every term of the attached term sheet for the provision of security to Allstate to secure the line of credit to AFS; and

FURTHER RESOLVED, that the officers of this company be, and they hereby are, authorized, directed and empowered to take such action as they may considered to be necessary to carry out the intent and effect of the forgoing resolution, including but not limit to, the

granting of security interest in the shares of AFS (a wholly owned subsidiary of the company) the giving of the Company's undertaking in respect of limiting the drawings under the credit facility to approved expenditure of AFS and the entering into of required loan documentation; and

FURTHER RESOLVED, that the officers of this Company be, and they hereby are authorized, and directed and empowered to take such action as they may consider to be required to spin out AFS to the shareholders of Argent Capital Corporation so that the result will be a free standing company away from and insulated from the business risks of the company on terms set forth in the attached schedule.

The board adopts the forgoing resolutions effective the last date any of the undersigned directors signed this action by consent.

(signature)	(signature)
Christopher A. Millar	Samuel B. Watson
Date: 8-25-99	Date: 8-25-99[17]

[17] Signature and dates on originals are hand written.

TERM SHEET:

Allstate Life Insurance and /or their subsidiary, Lincoln Benefit Life have agreed in principal to provide Argent Financial Services (AFS) with a $2 million dollar line of credit. The proposed terms of this facility are as follows:

Lender by Allstate)	Allstate (or another entity nominated
Borrower	Argent Financial Services
Amount	$2 million dollars
Facility type	Direct Draw line of credit
Instrument	Preferred Convertible Note (PCN)
Interest Rate	To be agreed
Security	1. A negative pledge deed entered into and between Argent Financial Services, Argent Capital Corporation and Lender. 2. The guarantee of Facility by Argent Capital Corporation. 3. A charge over the shares of Argent Financial Services in support of the Argent Capital Corporation guarantee
Drawings	As per the pre-agreed schedule of drawings under the Facility.
Term	Two years

Repayment

The note will be repaid in full at the end of the term in the event that neither of the following has occurred:

1. Allstate converted the drawings under the Facility to fully paid shares in AFS. The conversion rate will be calculated by way of a graduated scale (to be agreed) such that the earlier the conversion the higher the conversion factor, or

2. Argent Financial Services has repaid the drawn amount either in full or in part by way of the earning of bonus dollars through exceeding the pre-agree performance schedule. The level of performance (product sales) is to be agreed along with the bonus dollar conversion factor prior to closing.

It is knowledge that Allstate wishes to have argent Financial Services limit its general exposure to the on going business risks of Argent Capital Corporation. Therefore, Argent Financial Services will enter into a negative pledge deed guaranteed by Argent Capital Corporation. Argent Capital will give its undertaking that no funds drawn under the Facility will be used for any other purpose than that represented to the Lender.

SPIN OFF:

Argent Capital Corporation is to spin Argent Financial Services off to the shareholders of Argent Capital Corporation. Argent Capital will commence the process by filing the appropriate documentation with the SEC as soon as practical. Through the spin-off, Argent Financial Services will be isolated from the general business risks of Argent Capital Corporation. In the interim the Facility will be secured and protected from the business risks of Argent Capital through the above structured arrangements.

So long as any funds remain outstanding under the credit facility or Allstate owns more than 5% of the outstanding shares of AFS, AFS would make available one board seat to Allstate. Pending the spin-off the board seat will be an Argent Capital Corporation seat following spin-off an Argent Financial Services seat.

ARGENT CAPITAL CORPORATION

Minutes of the Meeting of the

Board of Directors

August 23, 1999

A meeting of the Board of Directors (the "board") of Argent Capital Corporation, a Nevada corporation ("The Company") was convened by telephone conference on August 23, 1999 at 2:30 p.m. central standard time. Present were Directors, Christopher A. Millar, Samuel B. Watson, Steve Davis and Simon Baitler. Absent was the chairman, Dr. Dennis Gutzman. Christopher Millar, acting as chairman, called the meeting validly convened.

1. **Background Discussion.**

Simon Baitler outlined for the board the position in respect of the negotiations between Argent Financial Services (AFS) and Allstate Life/Lincoln Benefit and Life. Mr. Baitler informed the board that he had received oral confirmation and had followed up with written confirmation that Allstate through its subsidiary, Lincoln Benefit Life was prepared to proceed with a joint business interest with AFS. Mr. Baitler informed the board that as part of the proposed relationship with AFSA they were prepared to provide by way of line of credit $2 million dollars. The terms of the facilities (credit line) are attached to this minute. However, in brief, the terms are as follows:

1. AFS is to start selling Allstate products in the latter part of 1999.
2. AFS is to provide Allstate with a schedule of drawings required and projected under the credit line.

3. AFS is to arrange for Allstate to speak directly to our funding organization.
4. AFS is to give assurances that funds advance will be expended on only meeting the financial requirements of AFS.
5. AFS is to provide protection from the general business risk associated with the business of Argent Capital Corporation.

2. **General Discussion.**

The board discussed ways in which Argent Capital Corporation could satisfy Allstate's requests and issues highlighted by Mr. Baitler. The issues as to selling product during the 1999 year, providing a schedule of drawings and having Allstate speak directly to AFS's funding organization were matters quickly agreed and dispensed with. As to the final two points in respect of assurances as to the use of the funds provided under the Allstate funding facility and the removal of Argent Capital business risk from AFS, these were discussed in greater detail.

The board was unanimous in their decision to give a board undertaking that any funds drawn under the Allstate facility would be used within AFS and only for the purposes described in the requested schedule of drawings.

In respect of removing the general business risk of Argent Capital Corporation from AFS several alternatives were discussed. However, in the end the board was unanimous in the decision to spin AFS out as soon as practical. As funding would be required prior to this, and the spin-off process projected to take some three to four months, an interim security arrangement was discussed. The interim security arrangement that was discussed was that a funding facility be entered into between AFS and Allstate. This facility would be guaranteed by Argent Capital Corporation. In support of the guarantee,

Argent Capital Corporation would grant a charge over the shares of Argent Financial Services. Mr. Davis requested that management obtain a legal opinion as to the issues of a spin-off.

After further discussion, upon motion duly made by Mr. Simon Baitler, seconded by Mr. Steve Davis, the attached resolution was adopted.

I certify these minutes to be true and accurate statements.

(original signed by Sam B. Watson)
Samuel B. Watson
Secretary

Lincoln Benefit Life
Finance Proposal Plan

Month/Year		Amount Loaned
October	15, 1999	$100,000
November	01, 1999	$100,000
December	01, 1999	$200,000
December	15, 1999	$100,000
January	01, 2000	$800,000
April	01, 2000	$700,000
Total		$2 million

Repayment/ Conversion Plan

eWealthUSA proposes that the funding be provided pursuant to Preferred Convertible Note (PCN) Facility. The terms of the note would allow for scheduled drawings up to the facility amount of $2,000,000. The drawings would attract an interest rate equivalent to the minimum amount required by the I.R.S. (We believe 6%) The loan would be convertible into equity in eWealthUSA at LBL's option. This could occur at intervals over the term of the 2 year facility. The debt could be converted at predetermined rates such that the earlier the date of conversion, the better the conversion rate as outlined below:

Conversion Date Prior to:		Discount to Market Price*
May	**01, 2000**	**50%**
November	**01, 2000**	**40%**
May	**01, 2001**	**20%**
November	**01, 2001**	**10%**

*Denotes Discount to Market Price based on average trading price during 30 days prior to conversion date.

Prior to the spin-off, the credit line facility will be guaranteed by Argent Capital Corporation and LBL would be granted a charge over all the shares of eWealthUSA until the earlier of:

1. The repayment in full of the credit line facility, or

2. The completion of the spin off.

So long as the funds remain outstanding under the credit line facility of LBL owns more than 5% of the outstanding shares of eWealthUSA, eWealthUSA will make available one board seat to LBL.

Additional Bonus Debt Retirement Program

Open for Discussion

ARGENT FINANCIAL SERVICE, INC. REVISED 8/18
($,000)

	7/99	8/99	9/99	10/99	11/99	12/99	Total
Total Projected Revenue	0	0	0	54	138	183	354
Total Com*			0	28	72	86	188
Total Projected Revenues Net Com				25	64	78	166
Total Expenses		159	361	335	271	285	1,413
NPBT*		-159	-361	-310	-207	-208	-1,247
Cum* NPBT*		-159	-521	-831	-1,038	-1,247	
Cum* NPAT*							
Valuation based on 20 P/e multiple							

* Com = Commission

* NPBT = Net Profit Before Tax

App. 39

ARGENT FINANCIAL SERVICES, INC, REVISED 8/18
($,000)

	1/00	2/00	3/00	4/00	5/00	6/00	7/00
Total Projected Revenue	395	790	987	1,185	4,259	4,866	6,085
Total Com*	259	319	649	779	3,202	3,680	4,575
Total Projected Revenues Net Com*	135	270	338	406	1,057	1,208	1,510
Total Expenses	364	442	482	588	617	612	662
NPBT*	-249	-171	-143	-181	439	595	847
Cum* NPBT*		-420	-563	-746	-308	289	1,137
Cum* NPAT*					-198	185	727
Valuation based on 20 P/e multiple							

ARGENT FINANCIAL SERVICES, INC, REVISED 8/18

($,000)

	1/00	2/00	3/00	4/00	5/00	6/00	7/00
Total Projected Revenue	395	790	987	1,185	4,259	4,888	6,085
Total Com*	259	519	649	779	3,202	3,680	4,575
Total Projected Revenues Net Com*	135	270	338	406	1,057	1,208	1,510
Total Expenses	384	442	482	588	617	612	662
NPBT*	-249	-171	-143	-181	439	595	847
Cum* NPBT*		-420	-563	-746	-306	289	1,137
Cum* NPAT*					-198	185	727
Valuation based on 20 P/e multiple							

App. 41

ARGENT FINANCIAL SERVICES, INC, REVISED 8/18

($,000)

	8/00	9/00	10/00	11/00	12/00	Total
Total Projected Revenue	7,302	9,738	12,170	14,604	17,038	79,421
Total Com*	5,490	7,520	9,150	10,980	12,810	59,394
Total Projected Revenues Net Com*	1,812	2,418	3,020	3,624	4,228	20,026
Total Expenses	932	828	925	1,021	1,120	8,618
NPBT*	879	1,587	2,094	2,602	3,107	11,410
Cum* NPBT*	2,017	3,604	5,699	8,302	11,410	
Cum* NPAT*	1,290	2,306	3,647	5,313	7,302	7,302
Valuation based on 20 P/e multiple						146,048

App. 42

eWealth Projections Beginning 1/1/2000- Jan- July
($,000)

	1/00	2/00	3/00	4/00	5/00	6/00	7/00
Total Projected Revenue	95	174	406	869	1,858	5,658	8,487
Total Com*	28	72	198	472	1,118	3,721	5,581
Total Projected Revenues Net Com*	66	102	208	396	742	1,937	2,905
Total Expenses	458	417	496	645	802	760	974
NPBT*	-391	-314	-288	-248	-60	1,176	1,931
Cum* NPBT*	0	-706	-995	-1,244	-1,304	-128	1,802
Cum* NPAT*		0	0	0	-834	-82	1,153
Valuation based on 20 P/e multiple							

eWealth Projections Beginning 1/1/2000 Aug - Dec
($,000)

	8/00	9/00	10/00	11/00	12/00	Total
Total Projected Revenue	11,316	18,770	26,277	28,155	28,155	130,222
Total Com*	7,442	12,703	17,785	19,055	19,055	87,231
Total Projected Revenues Net Com*	3,874	6,066	8,492	9,099	9,099	42,990
Total Expenses	1,081	1,193	1,518	1,575	1,577	11,502
NPBT*	2,792	4,872	6,974	7,523	7,522	31,488
Cum* NPBT*	4,595	9,468	16,442	23,966	31,488	
Cum* NPAT*	2,941	6,059	10,523	15,338	20,152	20,152
Valuation based on 20 P/e multiple						403,049

III. EIGHTH CIRCUIT ORDER DENYING REHEARING AND REHEARING EN BANC

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-1782

Lincoln Benefit Life Company, Inc.,	*	
	*	
Appellee,	*	Order Denying
	*	Petition for
	*	Rehearing and for
	*	Rehearing En Banc
eWealth USA, Inc.; et al,	*	
	*	
Appellants	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

November 21, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IV. ORDER ON FINAL PRETRIAL CONFERENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC., Plaintiff	§	Case No. 4:00CV3130
v.	§	**ORDER ON FINAL PRETRIAL CONFERENCE**
eWEALTH USA, INC., eWEALTH AMERICA INC., ARGENT, CAPITAL CORPORATION and ARGENT FINANCIAL SERVICES, INC. Defendants	§	

Plaintiff
Gary J. Nedved
KEATING O'GARA, DAVIS & NEDVED, PC
530 South 13th Street,
Suite A
Lincoln, NE 68508
402-475-8230

15840 FM 529,
Suite 211
Houston, Tx 77095
281-855-4100

Defendant
Tom Dickens
DICKENS AND ASSOCIATES

A final pretrial conference was held on the 27th day of September, 2001. Appearing for the parties as counsel were:

A. Exhibits. See attached exhibit list. The parties request t he Court's leave to allow the parties 7 days to refine and complete the exhibit list, to exchange complete sets of the opposing parties offers within the next 10 days to make objections and motions to exhibits within 21 days.

B. Uncontroverted Facts. The parties have agreed that the following may be accepted as established facts for purposes of this case only;

1. Lincoln Benefit Life (LBL) is a Nebraska domestic insurance corporation with its principal place of business in Lincoln, Lancaster County, Nebraska.

2. Lincoln Benefit Life agrees and stipulates for this litigation that should the Court determine that there was a binding agreement between Lincoln Benefit Life and any of the Defendants before February 1, 2000 (which is the subject of Defendants counterclaim against Lincoln Benefit Life) Lincoln Benefit Life agrees that LincolnBenefit Life is the proper party to that binding agreement and there is no need or benefit for the Defendants to bring Allstate into this suit or to bring a new cause against them.

3. The defendants are Nevada Corporations with their principal place of business in Brentwood, Tennessee. Argent Capital Corporation (ACC) is the parent company of the other defendants. Argent Financial Services, Inc. (AFS), a wholly owned subsidiary of ACC, changed its name to eWealth USA, Inc., which changed its name to eWealth America, Inc.,

subsequent to any of the events made the subject of this lawsuit. (Argent Capital Corporation, Argent Financial Services, Inc., and eWealth USA, Inc., are collectively referred to as "Argent").

4. Diversity of jurisdiction is established based on the above, and the amount in controversy is in excess of $75,000.00, exclusive of interest, costs and attorneys fees.

5. On September 3, 1999, Gene Wraith, President of Lincoln Benefit Life, signed a letter dated 8/20/99, initialed the paragraphs, made some handwritten changes, changed references from Allstate to LBL and sent the letter to Argent.

6. On February 3, 2000 Sam Watson, President of eWealth USA, Inc., signed a document entitled Loan Agreement with LBL.

7. After the execution of the Loan Agreement by Sam Watson, LBL forwarded an additional $200,000.00 to Argent.

8. The defendants have not repaid any of the $675,000.00 received from LBL.

C. **Controverted and Unresolved Issues.** The parties were unable to agree upon the unresolved issues and have submitted their individual issues for the Court's consideration. The issues remaining to be determined and unresolved matters for the Court's attention are:

PLAINTIFF'S STATEMENT OF ISSUES

1. Whether eWealth USA, Inc. breached the Loan Agreement and is liable under the Loan Agreement for the total amount of $675,000.00.

2. Whether the defendants have been unjustly enriched thus entitling LBL to recover on quantum merit or other restitutionary basis the total amount of $675,000.00.

3. Whether the letter dated August 20, 1999, was an agreement to make a future contract.

4. Whether the alleged August 1999 Agreement was sufficiently definite to be enforceable under Nebraska law.

5. Whether the alleged August 1999 Agreement failed to bind the parties as all of the terms were not agreed to and important elements were left for future negotiations.

6. Whether an offer to contract was made by LBL in August or September of 1999.

7. Whether any alleged offer made by LBL in August or September of 1999 was accepted by defendants before revocation or modification.

8. Whether LBL breached any contract to loan money to the defendants.

9. Whether the defendants failed to plead that all conditions precedent were performed as required by Fed. R. Civ. P. 9 (c) and whether the defendants performed all conditions precedent to the alleged August, 1999 Agreement.

10. Whether the Loan Agreement of February 3, 2000, is a contract complete in itself and supercedes and discharges any prior agreements made between the parties.

11. Whether the Loan Agreement of February 3, 2000 is a completely integrated written document purporting to express the terms of the contracts between the parties, and whether the Nebraska parol evidence rule renders ineffective any evidence of a prior oral agreement which adds to, alters, varies, or contradicts the terms of the Loan Agreement of February 3, 2000.

12. If the court finds the alleged "Letter Agreement" is an enforceable contract and that LBL breached the contract, is there sufficient evidence upon which the court could fairly determine with reasonable certainty, not on speculation and conjecture, the existence of Argent's damages caused by LBL's breach of the Letter Agreement?

13. If the court finds the alleged "Letter Agreement" is an enforceable contract and that LBL breached the contract, is there sufficient evidence upon which the court could fairly determine with reasonable certainty, not on speculation and conjecture, the extent of Argent's damages?

14. Whether any damages sought by defendants were reasonably foreseeable at the time of any contract formation.

15. The proper measure and amount of damages for any contract breached by LBL.

DEFENDANT'S STATEMENT OF ISSUES

16. Whether the "Letter Agreement" (previously referred to in Defendant's pleadings as the August 1999 agreement attached as an exhibit to the counterclaim) consisting of:

a. the **Letter Agreement Offer**, dated August 20, 1999, and initialed and signed by Gene Wraith (LBL President), after making some handwritten insertions, changing references from Allstate to LBL and then sent to Argent by LBL on September 3, 1999;

b. the **Acceptance Documents**, with attachments, delivered by Argent to LBL on September 9, 1999, consisting of:

1) an Action by the Board" by Argent's Board of Directors, with attached "Term Sheet" acknowledging the Board's agreement to each term of the Letter Agreement Offer; and
2) minutes of the August 23, 1999 Board of Directors meeting;

was a fully integrated and legally binding agreement between Argent and LBL.

17. If the Court finds the Letter Agreement to be legally binding upon Argent and LBL, whether LBL breached the Letter Agreement.

18. If the Court finds LBL breached the Letter Agreement, whether it was foreseeable to LBL that Argent would be damaged as a result of LBL's breach of the Letter Agreement.

19. If the Court finds that LBL breached the "Letter Agreement", the amount of Argent's damages resulting from LBL's breach of the Letter Agreement.

20. Whether the plaintiff failed to specifically plead that defendants failed to perform any claimed conditions precedent and are therefore not entitled to an issue on conditions precedent.

21. If the court finds that plaintiff s are entitled to any issue on conditions precedent, whether the defendants performed all such conditions precedent to the alleged August 1999 agreement (referenced by defendants as the Letter Agreement).

22. Whether the document entitled "Loan Agreement", signed by Sam Watson in February of 2000, was invalid and unenforceable against any of the Defendants as it was without consideration.

23. Whether the document entitled "Loan Agreement", signed by Sam Watson in February of 2000 was invalid and unenforceable against any of the Defendants as it was executed under economic duress and business coercion created by LBL.

24. Whether the document entitled "Loan Agreement", signed by Sam Watson in February of 2000 was invalid and unenforceable against any of the Defendants as the Letter Agreement was fully integrated and contained the entire agreement of the parties therefore; that the alleged Loan Agreement of February 3, 2000 materially contradicts the Letter Agreement; and therefore, LBL is estopped from introducing any other written or oral evidence contradicting the Letter Agreement under the parol evidence rule:

25. Whether the document entitled "Loan Agreement" signed by Sam Watson in February of 2000 was merely in supplementation of the Letter Agreement and intended only as a security of the amount already disbursed to Argent pursuant to the Letter Agreement.

26. Whether the value of any money received by Argent from LBL was destroyed by the actions of LBL and therefore, LBL cannot recover under any theory of unjust enrichment.

[PORTIONS OMITTED FROM THIS COPY FOR APEAL]

I. Trial Date. Trial is set for October 29, 2001.

Dated September ___, 2001.

BY THE COURT:

/s/

United States Magistrate Judge

Approval by Counsel;

LINCOLN BENEFIT LIFE COMPANY, Plaintiff

By: /s/
Gary J. Nedved, No. 15508
KEATING, O'GARA, DAVIS
& NEDVED, P.C.
A Limited Liability Organization
530 South 13th Street, Ste. A
Lincoln, Nebraska, 68508
Telephone: (402) 475-8230

eWEALTH INC., eWEALTH AMERICA, INC., ARGENT CAPITAL CORPORATION and ARGENT FINANCIAL SERVICES, INC.,
Defendants

By: /s/
Tom A. Dickens, No. 05820800
Tom A. Dickens and Associates
15840 FM 529, Suite 211
Houston, Texas 77095
Telephone: (281) 855-4100

V. ORDER BY THE DISTRICT COURT DENYING MOTION TO WITHDRAW FRCP 36 ADMISSIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC.,	§	
Plaintiff	§	
v.	§	
	§	4:00CV3130
	§	MEMORANDUM AND
eWEALTH USA, et al,	§	ORDER
Defendants	§	

There are two pending motions before me in this case. First, plaintiff ("LBL") wishes to amend 32 of its responses to requests for admissions. Defendant Argent strongly opposes the motion and challenges the authorities cited by the plaintiff in its brief.

I have reviewed the cases cited by the parties and conclude that the motion to amend must be denied. I agree with defendants that the case of FDIC v. Prusia, 18 F3d 637 (8th Cir. 1994) does not support the plaintiff's position. It was a case in which the admission was clearly factually wrong and shown to be so. In this case, on the other hand, plaintiff appears merely to have "misinterpreted" the requests for admission; it now seeks to "explain" that misinterpretation rather than stand on the facts admitted. That type of amendment is not contemplated by the provisions of Fed. R. Civ. P. 36. The consequences of admissions under Rule 36 is strong; if a party does not

understand the meaning of the request, it should say so before admitting the request of object and require clarification. Plaintiff has not done so here, and it must bear the consequences.

The discussion in Prusia clearly reflects the seriousness of making admissions in responding to Rule 36 requests, foreclosing factual inquiries into matters admitted as a means to have a case decided on its merits. The Court of Appeals directs that courts considering requests for amending admissions look to the aim of presenting the merits of the claim and not capitalize on inadvertent mistakes of fact. Denying the motion serves that purpose here, for the requested amendments are not to factual matters so much as to the nuances to be derived therefrom. Plaintiff should have contemplated their use before responding initially.

In addition, although the defendants have not made a strong showing of prejudice,[18] they have pointed to a number of factors that, taken together, demonstrate that at this late stage in the progression of the case, defendants would bee hard pressed to prepare for trial without additional costly discovery and, more importantly, they have relied upon the plaintiff's admissions in preparing to present their defenses and cannot recover without substantial hardships. I shall deny the motion to amend.

The defendants have filed a motion seeking leave to file a motion for summary judgment. Simply put, the motion is too late for there to be any realistic opportunity for a response and consideration by the court before trial. I shall deny it.

---

[18] Several factual assertions are made in the brief opposing the motion without evidentiary support. In accordance with NELR 7.1 those factual assertions have not been considered.

IT THEREFORE HEREBY IS ORDERED:

1. The plaintiff's motion to amend admissions, filing 70, is denied.
2. The defendants' motion for leave to file a motion to summary judgment out of time, filing 71, is denied.

DATED August 23, 2001.

BY THE COURT
(ORIGINAL SIGNATURE)
David L. Piester
United States Magistrate Judge

VI. SKEETER COLEMAN PRESENTATION

a. TRANSCRIPT OF VIDEO PRESENTATION IN EVIDENCE WHICH SHOWED SPEAKER AND THE CD-ROM PRESENTATION

John "Skeeter" Coleman: Thank you Sam.

Sam Watson: You're welcome.

Coleman: I'm glad to be here. And welcome to each and every one of you. As you know, Lincoln Benefit Life is domiciled in the great state of Nebraska. And today is college football day. So as Vanderbilt prepares to annihilate Kentucky, and as Tennessee is gearing up to slaughter the Hogs of Arkansas, be aware of the fact that the big red Cornhuskers of Nebraska are beginning to bury Kansas State in front of seventy-two thousand rabid fans and I should be there. And in deference to my team I have asked Mr. J.W. Marriott... is he in the room? Mr. Marriott in the room? The gentleman with the red jacket? Come up here J.W. Have you ever met J.W. Marriott? He owns this chain of hotels... and he's gonna give me my big red jacket so that I can stay in unison with my fans. Thanks J.W. All right, go big red! **We're glad to be here. Why are we glad to be here? Because we think that eWealth USA brings to the table everything it is that Lincoln Benefit Life and Allstate are about.** There is an incredible synergy that is here. The headlines of today's paper, did you see it? "It's a new ballgame". The Tennessean brings this to our attention. And that's the way we feel about eWealth USA. **Our mission today is to briefly familiarize you with Lincoln Benefit to let you know why it is that we consider this strategic partnership so important** and then to invite you to come to the breakout session to hear more about the company. If there is one word to describe LBL, it's growth. As a matter of fact, today, and there's seventeen hundred

insurance companies in the United States, we enjoy prominence in just about every single category. We entered the long-term care business just two years ago; we're amongst the top twenty writers of long-term care. Recently, the National Underwriter indicated that we had grown from number twenty-three last year to number eighteen in the sale of variable annuities. We entered the variable marketplace in 1994. So although we are relative newcomers to the securities business, we have rapidly accelerated to the top of the heap. If you look at our assets, we've grown from a billion in '89 to a little over eight billion by the end of this year. Number of agents, when I first came with the company we had fifty-nine thousand agents; we will finish the year with a hundred thousand agents. If you look at the face amount in 1989 we issued fourteen billion dollars of coverage, this year we will issue a hundred and thirty billion dollars of coverage. Net income, that figure that goes right to the bottom line, that number that determines whether or not a company is profitable, and we are profitable to our parent. Net income this year should be right at a hundred million dollars. Submitted premium, we will write a little over a billion five this year. It's like having a money machine in Lincoln, Nebraska that churns out a little over five million dollars every single business day to parent. So if you look at the average annual compound growth rate over the ten-year period, you can see where we have been very successful in a business in an industry that has seen a decline over the last ten years. So we are revolutionary as well. We are the renegades of the family, if you will. Let's talk about the strength of Lincoln Benefit. As has been mentioned on a number of occasions, we are a subsidiary of the Allstate Life Company. What does that mean? Well, that means that every single net new premium is totally reinsured with our parent. Lincoln Benefit, as I indicated, has about eight billion dollars in assets, thirty billion from the life company, sixty billion from property and casualty, so the entire holding company is a ninety

billion dollar corporation with a lot of capital. Our ratings, the second highest, are A+ from Best, double A+ from S&P, double A2 from Moody's, and even Mr. Weiss has given us a B rating. The Allstate Company insures one out of every eight households. That is an incredible penetration. The Allstate brand name... A recent study was done by a New York advertising agency, and what they did is they took a large group of people and they gave them a slogan, and they said, "First of all, tell me whether or not you recognize the slogan, and then tell me if you can identify what the slogan goes with." First slogan, "Like a rock". We've all heard it, haven't we? Ninety percent of the people surveyed recognized it, thirty eight percent could actually associate it with a Chevrolet. "We bring good things to life". Ninety percent of the individuals who were involved said, "yeah, we recognize that", and thirty three percent could identify that with General Electric. Talk about brand name power, "You're in good hands". Ninety seven percent recognized it and eighty four percent could associate that with Allstate. Powerful brand name. **We do have a definitive mission, and our strategic intent is public and powerful. It is our goal; it is our mission to be the dominant provider of personal financial products and services to security oriented U.S. customers. You startin' to see the fit?** But, how are you gonna do this, Coleman? You just said that the industry has seen a decline over the last ten years. Even LIMRA tells us, from 1977 to '86 we saw life insurance premiums escalating. Over the next ten years they were flat. At the same time, life insurance policies over that same period of time increased from 13.6 million a year to almost 17 million a year and they have actually decreased through 1997. What is our strategic intent? How do we plan on being different? How are we gonna revolutionize this industry? One of the things we're gonna do is to become consumer-centric. In the past, how did life insurance companies make money? Groups of individuals sat in boardrooms and they said, "If in fact we create this

product, we can convince our distribution system to sell it to consumers." And so it was a top down type of exercise. We firmly believe that we now need to start with the consumer, find out what the consumer's needs and wants are, and then work up from there. We plan on expanding our distribution. We know that the only way that we can meet our goals to double our premium from 1.5 to 3 billion dollars in a period of three years is to expand the distribution. We need to grow the brand, and by that I mean we need to increase premiums, and we are prepared to invest in technology. For those of you who might have read the business section of the paper just this past week on Wednesday, we announced that Allstate would lay off four thousand people. How do you plan on growin' if you're layin' off people? Interesting to note that three hundred and seventy one of those people came from Allstate Life, nine of those individuals came from Lincoln Benefit Life, and the balance came from the P and C Company. Does that tell us where it is that we're starting to focus? And Ed Liddy, our chairman, said the reason we need to do this is because quite frankly we need to come up with six hundred million dollars to refocus our efforts and to become much more involved in technology. **That's why we're excited about the eWealth USA revolution. We are proud to be a part of it. Why?** Because to us it gives us a new opportunity and we don't want to say no like Decca Records did when they were offered the opportunity to put this hippy, junky, weirdo, longhaired group on their label. And their reply? "Groups with guitars are on the way out." Missed opportunity. We don't want to be like Western Union when offered the opportunity to market the telephone replied, "What use could the company make of an electrical toy." **However, with eWealth USA, when Allstate, and specifically Lincoln Benefit saw this opportunity, we realized immediately that this would enhance our strategic intent and everyone, without fault, to a tee, said, "Let's do it." And that's why we're here today.** Why? Because we like

the idea of a consumer-driven approach. Hi-tech, hi-touch. We think that just like these two bicycle repair people Orville and Wilbur Wright, they invented the airplane; and we think that just like the schoolteacher Ely Whitney, who invented the cotton gin; and **just like the sculptor Samuel Morse, who is responsible for the telegraph; that at eWealth, Sam Watson is right on target. We do not wish to miss this opportunity because Sam and his team are changing the industry.** What a marvelous idea to be able to say to a consumer, "I can now give you the necessary funds to do whatever it is you need to do to enhance your wealth accumulation process. I'm not askin' you to find the monies, I'm gonna find 'em for you." **Great idea to use the home equity as a financial cornerstone for financial planning.** I love this story about missed opportunities. Many of us are familiar with the digital watch and in 1968 a Swiss watchmaker came to his boss and he said, "Look what I have done. I have created a digital watch." And at the time, the Swiss controlled sixty five percent of all the watch making in the world and eighty percent of its profits. And they said, "You know, that's a great idea, but it's really more of a novelty and surely it won't work. It doesn't have any springs. It doesn't have any bearings. The novelty won't last. But if you'd like, take it to the annual watch show." So they didn't even protect the idea, and when they took it to the watch show there were two entities, Seiko of Japan and Texas Instruments of Dallas, Texas, that picked up on the idea, and the rest is history. In 1970, the Swiss watchmakers laid off fifty thousand of the sixty five thousand watchmakers. And their share of the profits, world profits from watch making, plummeted from eighty percent to ten percent. **You've seen this quote and you'll see it again and again because it summarizes everything that eWealth is about and it what...it's what attracts us to the whole organization. Consumer driven, high-tech, products and services, high-touch, that's what eWealth is all about. Lincoln Benefit**

Life, remember what our strategic intent was? Our strategic intent complements what eWealth is about. Why? Because, we are consumer-centric, we want to expand our distribution, we want to grow our brand with new products and services, and we definitely are prepared to invest six hundred million dollars in new technology. We have a complete line of products and services; long-term care, life, annuities, fixed, indexed, and variable. And during the breakout session, you'll get a taste of all of 'em. Why do we have so many? Because... what is it that your consumer wants? Wealth accumulation, debt elimination, and asset protection. That's what we're all about. How does life insurance help there? Wealth accumulation? We offer that with a tax advantage basis. Debt elimination? We offer that through preferred loans, zero net cost loans on all products. And asset protection. The death benefit does what? Eliminates an incredible number of risks. The same is true with long-term care, where you can provide asset protection and your client's choice to remain independent and continue to enjoy that quality of life which they worked so hard to secure. And with annuities? Again, tax-deferred accumulation, and the only financial vehicle that can guarantee income for your client's life. Life insurance, that's dull, that's boring. And it has been for a lot o' years. And that's why we plan on revolutionizing the marketplace. That's why we plan on continuing to accelerate our venture into the indexed universal life marketplace. **And we do have on the drawing board for you an extremely competitive product.** Ladies and gentlemen, the revolution that we have been talking about will not be televised, however, it will be broadcast on-line. **And so, I'd like to say, thank you, good luck, we hope you come to our breakout session, and be assured that Lincoln Benefit Life is prepared to do everything possible to make this a positive and rewarding venture for all of us. Thank you.**

b. JUDICIAL ADMISSIONS RELATED TO SKEETER COLEMAN'S PRESENTATION INCLUDING THE CD-ROM PRESENTATION WHICH WAS PART OF HIS PRESENTATION AND IN EVIDENCE

(RFA 1st set-#130) Admit that LBL was responsible for deciding what information was included in the CD-ROM presentation that played behind Skeeter Coleman at the Tennessee rollout. (see attached exhibit "C" which is a copy of the insert identifying the CD-ROM and exhibit "A" which is a copy of the CD-ROM.)

RESPONSE: Admit

(RFA 1st set-#126) Admit that LBL approved the information contained on the CD-ROM referenced in exhibit 501.

RESPONSE: Admit.

(RFA 1st set-#129) Admit that the information in the CD-ROM presentation that played behind Skeeter Coleman at the Tennessee rollout was true. (see attached exhibit "C" which is a copy of the insert identifying the CD-ROM and exhibit "A" which is a copy of the CD-ROM.)

RESPONSE: Admit.

(RFA 1st set-#127) Admit that the facts and opinions contained in the CD-ROM referenced in exhibit 501 are true.

RESPONSE: Admit.

(RFA 1st set-#128) Admit that LBL intends for individuals to rely upon the facts and opinions contained in the CD-Rom referenced in exhibit 501.

RESPONSE: Admit.

(RFA 1st set-#131) Admit that LBL authorized ARGENT to utilize the CD-ROM, identified by exhibit "C", to promote ARGENT's business. (see attached exhibit "C" which is a copy of the insert identifying the CD-ROM and exhibit "A" which is a copy of the CD-ROM.)

RESPONSE: Admit

(RFA 2nd set-#67) Admit that the video tape presentations of LBL employees and officers contained truthful and reliable information.

RESPONSE: Admits

(RFA 2nd set-#68) Admit that the live presentations of LBL employees and officers which were videoed contained truthful and reliable information. (This admission only seeks an admission as to the information provided the LBL employees and officers.)

RESPONSE: Admits

(RFA 1st set-#80) Admit that Skeeter Coleman was an employee of LBL at the time he participated in the rollout meeting as reflected in exhibit "B".

RESPONSE: Admit.

(RFA 1st set-#81) Admit that Skeeter Coleman was authorized to make representations on behalf of LBL and Allstate in 1999 and at the time he made the presentation at the rollout meeting.

RESPONSE: Admit.

(RFA 1st set-#84) Admit that that when Skeeter Coleman made the statements that are evidence by exhibit "B" Skeeter Coleman was making those statements on LBL's behalf.

RESPONSE: Admit.

(RFA 1st set-#82) Admit that the facts represented by Skeeter Coleman in exhibit "B" were true.

RESPONSE: Admit.

(RFA 1st set-#83) Admit that the opinions represented by Skeeter Coleman in exhibit "B" were true.

RESPONSE: Admit.

(RFA 1st set-#85) Admit that Skeeter Coleman is qualified by experience, education, training and background to have the opinions which he expressed as evidenced by exhibit "B".

RESPONSE: Admit.

(RFA 1st set-#86) Admit that Skeeter Coleman had the authority of LBL to make the representations as contained on exhibit "B" on behalf of LBL.

RESPONSE: Admit

(RFA 1st set-#88) Admit that Skeeter Coleman's representation, as evidenced by exhibit "B", of LBL's commitment to ARGENT was true.

RESPONSE: Admit.

(RFA 1st set-#89) Admit that Skeeter Coleman's representation, as evidenced by exhibit "B", of Allstate's commitment to ARGENT was true.

RESPONSE: Admit

(RFA 1st set-#90) Admit that Skeeter Coleman's representation, as evidenced in exhibit "B", regarding how LBL's mission fit with ARGENT and ARGENT's business plan was true.

RESPONSE: Admit

(RFA 1st set-#91)Admit that Skeeter Coleman's representation, as evidenced in exhibit "B", that LBL was a part of the ARGENT revolution was true.

RESPONSE: Admit

(RFA 1st set-#92) Admit that Skeeter Coleman's representation, as evidenced in exhibit "B", that LBL's intent was to compliment what ARGENT was about was true.

RESPONSE: Admit

(RFA 1st set-#95) Admit that Skeeter Coleman's representation, as evidenced in exhibit "B", that LBL had on the drawing board for ARGENT an extremely competitive product was true.

RESPONSE: Admit

(RFA 1st set-#96) Admit that all of the representations of Skeeter Coleman, as evidenced in exhibit "B", were made with LBL's consent and with LBL's knowledge that the representations would be relied upon.

RESPONSE: Admit

VII. LARRY DAHL MEMO TO TOM WILSON

MEMORANDUM
Confidential

January 12, 2000

To: Gene Wraith
From: Larry Dahl

Project:
e-Wealth USA

Broker:
Lou Lower introduction at a Goldman Sachs meeting.

Deal Description:
e-Wealth USA (e-Wealth) is a network marketing organization (similar in nature to WMA and A. L. Williams). ***Its lead players, Sam Watson and Gary Brown, have very successful production results in this distribution niche.*** [19]Leveraging on past relationships, they expect to have over 30,000 licensed agents within 24 months. e-Wealth plans to use technology to streamline operations and efficiently process business. ***They have strategic relationships in place with e-Bank, tax protection services, and an experienced RIA who will help to establish a broker-dealer.*** e-Wealth will also have a creative home mortgage refinancing sales platform to offer its agents as a door opener ***(they have significant sources of mortgage capital through e-Bank).***

e-Wealth offers LBL an opportunity to sell its entire portfolio of products - fixed and variable - with an emphasis on permanent, rather than term insurance,

---

[19] Any material that is **bold**, *italics*, and underlined in this document is added for clarity for the Court to locate key pieces of information.

through over 30,000 producers. While the creative use of technology is a key component to how e-Wealth will provide service to its agents and to a lesser extent, its clients, e-Wealth is not really an e-commerce play. It is a "bet" on a distribution system that rewards consistent production.

Projections:
Attached are "business plan projections." If e-Wealth attains its results, it would equal almost one-third of LBL's total 1999 target life insurance production. If e-Wealth achieves only one-third of its projections, it will still be a significant distribution force and contribute over $25 million of target life insurance production.

Conflict issues:
Given the type of sales force that e-Wealth will use, we do not believe that it presents a channel conflict within LBL or Allstate Life.

Deal:
e-Wealth requires a significant "start-up" financial contribution ($2 million) from LBL. This will be a demand note with an option, to our discretion, to take stock in lieu of cash. Several financial protection "features" have been discussed.

- Demand note - LBL can call the note at any time.
- Until the effective date of the proposed spin-off of e-Wealth from Argent Capital Corp. (a publicly traded company and the parent of e-Wealth), the note will be guaranteed by Argent Capital.
- Sam Watson will personally guarantee the note - he effectively has voting control of the parent company and will have the same voting control over e-Wealth after the proposed spin-off.
- Cash disbursements/loan distributions from LBL will be contingent upon e-Wealth attaining certain sales quotas.

- LBL has the option to draw down the note at certain times and certain rates, once e-Wealth operates at a profit.
- LBL will have a seat on the board of Argent Capital and then e-Wealth, until the note is repaid.
- LBL will hold back a certain percentage of the MBA bonus that would be due e-Wealth as another source of repayment for the loan.

Recommendation:
As noted, this is a bet on distribution. We think, based upon our discussions with management, review of operations, and participation in certain kick-off meetings, that this is a reasonable bet. It also could be a way for ALIC to learn about e-commerce strategies, tactics, and results through actual experience.

Status:
Based upon the strong support of Lou Lower, LBL has advanced some funds ($475,000) to e-Wealth. After discussions with Tom Wilson made it clear that he was unaware of this transaction, LBL has not advanced any funds that were not previously committed.

e-Wealth is currently at a critical stage of their business development. They are moving from the design to the implementation stage and have current sales opportunities as evidenced by the opportunity to place over 200 life insurance policies to employees of a division of AMOCO. ***If LBL's funding ceases, e-Wealth's ongoing validity will be placed in jeopardy; thus, repayment of our advances may be negatively impacted.***

LWD:mz
Enclosures

Copy to: Marv Ehly, Bob Rich, Carol Watson

a. ADMISSIONS RELEVANT TO LARRY DAHL'S MEMO TO GENE WRAITH.

(RFA 1st set-#142) Admit that the information in exhibits 217-218 is true. (217-218 = Dahl memo, App. 67-69)
RESPONSE: Admit

(RFA 1st set-#147) Admit that the information in exhibits 217-218 is reasonable. (217-218 = Dahl memo, App. 67-69)
RESPONSE: Admit.

(RFA 1st set-#143) Admit that the information in exhibits 217-218 is reliable. (217-218 = Dahl memo, App. 67-69)
RESPONSE: Admit

(RFA 1st set-#167) Admit that the conclusions of Larry Dahl, as expressed or memorialized in exhibits 217-218 were reasonable. (217-218 = Dahl memo, App. 67-69)
RESPONSE: Admit

(RFA 1st set-#146) Admit that Larry Dahl, in the course and scope of his relationship with LBL, is and has been reliable.
RESPONSE: Admit

(RFA 1st set-#144) Admit that Larry Dahl was being truthful when he wrote the memorandum of January 12, 2000.
RESPONSE: Admit

(RFA 1st set-#150) Admit that Larry Dahl has sufficient experience, education, training and background to make or form reliable opinions regarding the types of matters addressed in exhibits 217-218. (217-218 = Dahl memo, App. 67-69)
RESPONSE: Admit

(RFA 1st set-#151) Admit that Gene Wraith has sufficient experience, education, training and background to

reasonably evaluate the validity of information as contained in exhibits 217-218. (217-218 = Dahl memo, App. 67-69)

RESPONSE: Admit

(RFA 1st set-#152) Admit that the opinions of officers of LBL, as expressed in the attached documents, are reliable.

RESPONSE: Admit[20]

---

[20] LBL Response to Argent's First Request for Admissions #152.

VIII. GENE WRAITH'S LETTER TO TOM WILSON REGARDING ARGENT

LINCOLN BENNEFIT LIFE COMPANY

A MEMBER OF THE ALLSTATE LIFE GROUP

January 18, 2000

Tom,

Thanks for your prompt voice mail concerning the E-Wealth Project.

With regard to our financial support of E-Wealth, I probably misspoke when referencing to commission advances. This is mostly from habit rather than from a lack of understanding.

LBL has not offered commission advances since 1985. We do, however, advance cash amounts to MBAs for specific needs when requested and approved by LBL. These advances are generally in amounts of less than $50,000, but in rare instances, may be as much as $100,000. Typically these advances are made for marketing expansion purposes, remodeling and various other purposes that make sense to LBL, and offer an opportunity to expand our marketing relationship with the MBA. Most often, the advances are tied back to a specific bonus the MBA will earn in the same calendar year. It would be very rare for an advance to remain unpaid for more than 6 months. Unlike a true "commission advance", these amounts are not tied to specific commission generating cases.

In the case of E-Wealth, the requested funds were for the organizational development of a new large distribution system, with promises of great volumes of new business from outside of our typical customer segments. It appeared to offer considerable upside sales opportunities without channel conflict.[21]

In preliminary discussions with Lou Lower, I indicated that I would be uncomfortable with any debt exposure in excess of $500,000 prior to the submission of a steady flow of new business; and with a debt of any size that extends for a period greater than 24 months. Unfortunately, E-Wealth, for a number of reasons, was delayed in producing business and has a continued need for additional funding, albeit that they commit that any indebtedness will not exceed 24 months.

As we discussed, at this point we have advanced $475,000 and we are half pregnant. E-Wealth is ready to rollout their program on a national basis but they lack the financial support to move forward.

As I see it, we have the following options:

1) ***Discontinue our relationship with E-Wealth with a demand note for 475,000 to be paid within 6 months.***
2) ***Continue our relationship and limit our total cash exposure to $1.2 million. This will scale back their rollout but will limit our total cash exposure. We would hold Argent Capital and E-Wealth stock as collateral until we receive payment in full at the end of the agreed upon 24-month period.***
3) ***Continue our relationship with a full national program rollout with continued cash advances in the amount of $150,000 per month for 10 months, and a total cash exposure of $1,975,000 collateralized by their stock until***

---

[21] Any material that is **bold**, *italics*, and underlined in this document is added for clarity for the Court to locate key pieces of information.

the debt is repaid in full, at the end of 24 months. We would also escrow 50% of their MBA Bonuses, which should limit this financial exposure to less than $1,500,000 overall.

Within our sector of the industry it is not uncommon for carriers to advance developmental funds to grow their business. Oftentimes these funds are necessary in order to transition a distribution group from one carrier to another. In this particular case, ***the financial commitment was*** larger than usual as was the growth potential. The negative aspects of this opportunity were the required funding amount in the first year and the securitization of the loan. ***The positive aspects included the unique large additional distribution system; potential for sizable premium growth; lack of channel conflict; differentiated consumer segment; singular carrier representation; the management's previous success pattern; and to some extent, Lou Lower's familiarization with the management staff and initial introduction to LBL.***

As indicated in our recent discussions, I am now very uncomfortable in moving forward with this opportunity without your personal approval. ***I will await your instructions/coaching.***

Thanks for your consideration.
Gene Wraith

a. JUDICIAL ADMISSIONS RELEVANT TO GENE WRAITH'S LETTER TO TOM WILSON

(RFA 2nd set-#31) Admit that the information in exhibits A00727-A00728 is true. (A00727-A00728 = App. 72-74)
RESPONSE: Admits

(RFA 2nd set-#32) Admit that the information in exhibits A00727-A00728 is reasonable. (A00727-A00728 = App. 72-74)
RESPONSE: Admits

(RFA 2nd set-#33) Admit that the information in exhibits A00727-A00728 is reliable. (A00727-A00728 = App. 72-74)
RESPONSE: Admits

(RFA 2nd set-#34) Admit that Mr. Wraith was being truthful when he wrote the letter of January 18, 2000 to Tom Wilson. (Exhibits A00727-A00728) (A00727-A00728 = App. 72-74)
RESPONSE: Admits

(RFA 2nd set-#35) Admit that Gene Wraith has sufficient experience, education, training and background to make or form reliable opinions regarding the types of matters addressed in exhibits A00727-A00728. (A00727-A00728 = App. 72-74)
RESPONSE: Admits

(RFA 2nd set-#36) Admit that Gene Wraith has sufficient experience, education, training and background to reasonably evaluate the validity of information as contained in exhibits A00727-A00728. (A00727-A00728 = App. 72-74)
RESPONSE: Admits

(RFA 2nd set-#55) Admit exhibits "217-218" were created in part to obtain Tom Wilson's support the "eWealth Project"

as referenced in the memo. (217-218 = Dahl memo, App. 67-69). RESPONSE: Admits

IX. RULE 36 ADMISSIONS RELEVANT TO SPECIFIC TOPICS.

a. LBL'S KNOWLEDGE THAT ARGENT WAS SEEKING A PARTNER AND TIME WAS TIGHT

(RFA 1st set-#3) Admit that ARGENT was seeking a partner with a first rate company such as Allstate. (see exhibit 1002)
RESPONSE: Admit

(RFA 1st set-#4) Admit that LBL knew ARGENT was seeking a partner with a first rate company such as Allstate. (see exhibit 1001)
RESPONSE: Admit

(RFA 1st set-#18) Admit that LBL knew on or before August 1, 1999 that ARGENT believed the timing was getting tight and that it was important for ARGENT to choose their partner by August 1, 1999. (see exhibit 1004)
RESPONSE: Admit

b. OFFER BY LBL MADE TO ARGENT

(RFA 1st set-#31) Admit that after a meeting with an ARGENT representative Lou Lower received from Si Baitler attached exhibits 119-121 without the hand written notes or initials. (119-121=App.24-27)
RESPONSE: Admit.

(RFA 1st set-#32) Admit that after receiving exhibits 119-121 Mr. Wraith initialed paragraphs 1, 2, 3, 4, 5, made the hand written changes to paragraphs 2, 3 and the bullet point regarding the credit line facility (changing Allstate to LBL)

and then signed and dated the document. (119-121=App.24-27)

RESPONSE: Admit

(RFA 1st set-#33) Admit that after receiving exhibits 119-121 an officer of LBL initialed paragraphs 1, 2, 3, 4, 5, made the hand written changes to paragraphs 2, 3 and the bullet point regarding the credit line facility (changing Allstate to LBL) and then signed and dated the document. (119-121=App.24-27)

RESPONSE: Admit

(RFA 1st set-#22) Admit that Gene Wraith originally wrote the hand written notes on the exhibits 119-121. (119-121=App.24-27)

RESPONSE: Admit

(RFA 1st set-#30) Admit that in August of 1999 Gene Wraith had authority to enter into contracts on behalf of LBL.

RESPONSE: Admit

(RFA 1st set-#34)Admit that after making the changes, as referenced in the prior two admissions, exhibits 119-121 were then returned to ARGENT. (119-121=App.24-27)

RESPONSE: Admit

c. ACCEPTANCE

(RFA first set #35) Admit that after exhibits 119-121 were returned to ARGENT, LBL then received exhibits 122-126 from ARGENT. (119-121=App.24-27; 122-126=App. 28-29)

RESPONSE: Admit.

(RFA first set #36) Admit that after exhibits 119-121 were returned to ARGENT, LBL then received exhibits 129-130 (The Term Sheet) from ARGENT. (119-121=App.24-27, 129-130=App.30-32)

RESPONSE: Admit.

(RFA first set #37) Admit that after exhibits 119-121 were returned to ARGENT, LBL then received exhibits 122-126 (Consent of the Board of Directors) from ARGENT. (119-121=App.24-27, 122-126=App.28-29)

RESPONSE: Admit.

(RFA first set #38) Admit that after exhibits 119-121 were returned to ARGENT, LBL then received exhibits 131-132 (Minutes of Board Meeting) from ARGENT. (119-121=App.24-27, 131-131=App.33-35)

RESPONSE: Admit.

(RFA first set #42) Admit that exhibits 133-134 were sent to LBL from ARGENT without the hand written notes that currently appear on the exhibits. (133-134=App.36-37)

RESPONSE: Admit.

(RFA first set #44) Admit that sometime after the first check for $100,000 was sent to ARGENT from LBL hand written notes were made to exhibits 133-134 by employees or officers of LBL. (133-134=App.36-37)

RESPONSE: Admit.

(RFA 1st set-#40) Admit that LBL does not have a factual basis to deny that exhibits 122- 126, 131-132 and 129-130 were received at the same time by LBL. (App. 28-29,33-35, 30-32)

RESPONSE: Admit

d.PERFORMANCE

(RFA 1st set-#45) Admit that in the month of October 1999 LBL sent ARGENT $100,000.

RESPONSE: Admit

(RFA 1st set-#46) Admit that in the month of November 1999 LBL sent ARGENT $100,000.

RESPONSE: Admit.

(RFA 1st set-#47) Admit that in the month of December 1999 LBL sent ARGENT $200,000.

RESPONSE: Admit

(RFA 1st set-#155) Admit that after LBL sent the proposed agreement, exhibits 169-210, to ARGENT in December of 1999 and before 2-1-00, LBL sent another check for at least $75,000 to ARGENT.

RESPONSE: Admit

(RFA 1st set-#60) Admit that LBL knew that ARGENT began measures to "spin ARGENT off into a stand-alone publicly listed corporate entity".

RESPONSE: Admit

(RFA 1st set-#10) Admit that LBL expected to be repaid the $475,000 it paid to ARGENT.

RESPONSE: Admit

(RFA 1st set-#119) Admit that prior to 2-1-00 LBL did give money to ARGENT in the amount of $475,000 with the expectation of being repaid.

RESPONSE: Admit

(RFA 2nd set-#7) Admit that LBL loaned money to ARGENT.

RESPONSE: Admit

(RFA 1st set-#62) Admit that Mr. Wraith gave Simon Baitler permission for ARGENT to use the exhibits 119-121 to attract investors. (119-121=App.24-27)

RESPONSE: Admit

(RFA 1st set-#123) Admit that LBL knew, prior to 2-1-2000, ARGENT was representing to third parties that LBL was their "Strategic Partner".

RESPONSE: Admit.

e. LBL'S ADMISSION THAT THEY NEVER INFORMED ARGENT LBL'S DID NOT BELIEVE THEMSELVES TO BE BOUND TO THE TERMS OF THE LETTER AGREEMENT.

(RFA 1st set-#161) Admit that LBL did not inform ARGENT that LBL did not believe LBL to be committed to funding $2,000,000 under the terms of exhibits 119-130 until after 1-15-00. (Note: Exhibit 119-130 are the documents comprising the Letter Agreement Offer, Argent Board Resolution and Term Sheet.) (119-130= App.24-43)

RESPONSE: Admit

(RFA 1st set-#162) Admit that LBL did not inform ARGENT that LBL did not believe LBL had a duty to fund $2,000,000 under the terms of exhibits 119-130 until after 1-15-00. (Note: Exhibit 119-130 are the documents comprising the Letter Agreement Offer, Argent Board Resolution and Term Sheet.) (119-130= App.24-43)

RESPONSE: Admit

f. FORESEEABILITY AND CAUSATION

(RFA 1st set-#163) Admit that it is true that if LBL cut off funding to ARGENT, ARGENT's ongoing validity would be placed in jeopardy; thus, repayment of the advances would be negatively impacted. (see exhibits 217-218) (217-218 = Dahl memo, App. 67-69)

RESPONSE: Admit

(RFA 1st set-#164) Admit that LBL knew prior to 2-1-00 that ARGENT had become economically dependant upon funding from LBL for its operating overhead.

RESPONSE: Admit

g. ARGENT WAS NOT A SPECULATIVE BUSINESS AND LBL'S OFFICERS' HAD FIDUCIARY DUTIES.

(RFA 1st set-#70) Admit that the officers and directors of LBL had a fiduciary duty to LBL.

RESPONSE: Admit

(RFA 2nd set-#53) Admit that officers of LBL have a fiduciary obligation when documenting or preparing reports on a matter affecting LBL to base any opinions on reliable information.

RESPONSE: Admits

(RFA 1st set-#74) Admit that the officers and directors of LBL had a fiduciary duty to not involve LBL in speculative business ventures or opportunities.

RESPONSE: Admit

(RFA 1st set-#7) Admit that LBL does not invest in business opportunities that it believes to be speculative.

RESPONSE: Admit

(RFA 1st set-#14) Admit that LBL never documented a belief or opinion that LBL's business involvement with ARGENT was unreasonable.

RESPONSE Admit

(RFA 1st set-#15) Admit that LBL never documented a belief or opinion that LBL's business involvement with ARGENT would have been financially too speculative for LBL.

RESPONSE: Admit

(RFA 3rd set-#5) Admit that neither Allstate nor LBL ever created or caused to be created or calculated financial projections regarding the ARGENT's business plan.

RESPONSE: Admit

(RFA 1st set-#23) Admit that LBL never felt it necessary to calculate its own projections as to the future profitability of ARGENT.

RESPONSE: Admit

(RFA 1st set-#25) Admit that the officers of LBL had sufficient background, experience and training to make a reasonable decision as to the business necessity of calculating their own projections regarding the future profitability of ARGENT.

RESPONSE: Admit.

(RFA 1st set-#67) Admit that LBL cannot identify an officer of LBL who documented, prior to 2-1-2000, a belief that the opinions expressed by ARGENT, prior to 2-1-2000, in ARGENT's business plan and financial projections were not reasonable and reliable.

RESPONSE: Admit

(RFA 1st set-#72) Admit that the officers of LBL did not violate their fiduciary duty to LBL.

RESPONSE: Admit

(RFA 1st set-#77) Admit that the officers and directors of LBL did not violate their fiduciary duties when dealing with ARGENT.

RESPONSE: Admit

h. ADMISSIONS RELEVANT TO DAMAGE CALCULATIONS

(RFA 2nd set-#50) Admit LIMRA International is a reliable source for industry information in the life insurance industry. (Wraith deposition)

RESPONSE: Admits

(RFA 2nd set-#51) Admit LIMRA International is a reliable source used by life insurance industry for agent productivity information (Wraith deposition)

RESPONSE: Admits

(RFA 2nd set-#45) Admit the information from LIMRA International attached to the deposition of Gene Wraith is reasonable.

RESPONSE: Admits

(RFA 2nd set-#46) Admit the information from LIMRA International attached to the deposition of Gene Wraith is reliable. (Wraith deposition)

RESPONSE: Admits

(RFA 2nd set-#49) Admit that a P/E ratio is a generally accepted business tool or method to evaluate the value of a company? (Wraith deposition)

RESPONSE Admits

(RFA 3rd set-#29) Admit that Gene Wraith is qualified by experience, training and background to form reliable opinions regarding matters testified to as appears in exhibit "C". (Exhibit "C" is the testimony referenced regarding the P/E ratio for Argent)

RESPONSE: Admit

(RFA 3rd set-#30) Admit that Gene Wraith is qualified by experience, training and background to express the opinions in the attached exhibit "C". (Exhibit "C" is the testimony referenced regarding the P/E ratio for Argent)

RESPONSE: Admit

X. FIRST SET OF REQUESTS FOR ADMISSIONS-BALANCE OF ADMISSIONS NOT DISPLAYED PREVIOUSLY IN APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC.,	§	
Plaintiff	§	
v.	§	
	§	Case No. 4:00CV3130
eWEALTH USA, eWEALTH AMERICA, INC., ARGENT CAPITAL CORPORATION, and ARGENT FINANCIAL SERVICES, INC.,	§	
Defendants	§	

REQUEST FOR ADMISSIONS TO
PLAINTIFF/COUNTER DEFENDANT

TO: Plaintiff/Counter Defendant, LINCOLN BENEFIT LIFE COMPANY, INC., and its counsel of record, Gary J. Nedved; Keating, O'Gara, Davis & Nedved, P.C.; 530 South 13th Street, Suite A; Lincoln, Nebraska 68508.

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants/Counter Plaintiffs, eWealthUSA, eWealth America, Inc., Argent Capital Corporation, and Argent Financial Services, Inc. propound to Plaintiff/Counter

Defendant Lincoln Benefit Life Company, Inc., and its counsel of record, Gary Nedved, these Request for Admissions to be answered fully and under oath within thirty (30) days after service hereof.

Definitions:

1. For the purposes of these discovery requests, the terms "you", "your" and "yourself" shall pertain to Plaintiff/Counter Defendant Lincoln Benefit Life Company, Inc., and its counsel of record, Gary Nedved.

2. All named references to exhibits are stipulated to have no legal significance as used herein but used only for easy identification of the documents attached to these Requests for Admissions.

3. References to "ARGENT" will collectively and individually reference eWealthUSA, eWealth America, Inc., Argent Capital Corporation, and Argent Financial Services, Inc., the Defendants and Counter Claimants.

4. "Reasonable" means fair, proper, just, moderate, suitable under the circumstances; having the faculty of reason; rational; governed by reason; under the influence of reason; not immoderate or excessive; honest; fair; and equitable.

5. "Conclusion(s)" is defined as the logical consequence(s), result(s) or outcome(s), of a reasoning process.

6. As referenced herein, references to "LBL" include Lincoln Benefit Life, the Plaintiff and Counter Defendant.

7. As referenced herein, references to "Allstate" include Allstate Life Insurance Company or its parent company.

8. "ARGENT's business plan" or "the business plan" is defined as the business plan presented to LBL by ARGENT prior to October 1, 1999.

9. "Loan money" or "loan" or "lend money" or "lent money" is defined as the act of giving money by way of cash, check, bank draft or any other vehicle where money is transferred with the intention by the individual or entity giving the money that it be repaid in the future.

10. "Reasonably reliable"- of the type, quality and form usually relied upon by entities in the same or similar business and circumstance.

11. "Speculative" is defined as something that is not based upon reliable facts or reasonable assumptions.

12. "Generally accepted business practices"- those procedures or practices customarily and reasonably utilized by a business or corporation, within the same or similar industry or circumstance.

13. "Fiduciary duty" is defined as a duty to act in a manner consistent with a high degree of good faith and honesty. A fiduciary duty includes the duty to disclose significant information.

14. References to exhibits and their numbering as "*-*" includes the first and last numbered exhibits as well as all of those in between. For example, 114-116, would include references to 114, 115 and 116.

REQUESTS FOR ADMISSION

1. Admit that all of the documents attached hereto are admissible as business records of LBL.

RESPONSE: Admit that the documents are business records but does not admit that the documents are "admissible" into evidence.

2. Admit that LBL has previously provided to ARGENT, through discovery, all of the documents in LBL's control or subject to their control that are material or relevant to the issues involved in this pending litigation. (This admission is not intended to reference documents prepared by any expert subsequent to the filing of this lawsuit)

RESPONSE: Admit. LBL has discovered an additional file of Debra Schleining, a copy of which is attached. LBL has not produced documents protected by the attorney/client and work product privilege.

17. Admit that the dates on the attached documents reasonably reflect the dates they were either created or received. [First set of Requests for admissions - #17]

RESPONSE: Admit.

20. Admit that the hand written notes on the attached exhibits originally created by ARGENT were made by officers of LBL.

RESPONSE: Admit.

21. Admit that the hand written notes on the attached exhibits represent the opinions of and facts known to LBL employees or officers.

RESPONSE: Admit.

29. Admit that in August of 1999 Lou Lower had authority to enter into contracts on behalf of LBL.

RESPONSE: Admit.

48. Admit that prior to December 1999 the hand written notes were made by officers of LBL to exhibits 133-134. (133-134=App.36-37)

RESPONSE: Admit that the handwritten notes were made by an officer of LBL, but denies the remainder of the request because the date of the notes cannot be determined.

56. Admit that officers and employees of LBL would have, as part of their habit and routine practice, made notes of or documented significant facts that they became aware of in the course of their dealings with ARGENT.

RESPONSE: Admit that some officers and employees may make some notes but deny the remainder of the request.

58. Admit that before LBL sent ARGENT the first $100,000 check LBL did not document or express in writing that ARGENT had not adequately cooperated with any requests for information from ARGENT pursuant to LBL's investigation of ARGENT.

RESPONSE: Admit.

59. Admit that before LBL sent ARGENT the first $100,000 check LBL did not communicate in any way to ARGENT that ARGENT had not provided adequate information to LBL when LBL was investigating ARGENT.

RESPONSE: Admit.

63. Admit the hand written notes on exhibits 490-492 were made by an officer of LBL.

RESPONSE: Admit.

69. Admit that LBL did not document, prior to 2-1-00, any concern that LBL did not have an opportunity to investigate all of the factual representations as reflected in exhibits 701-

703 prior to the first check for $100,000 being sent to ARGENT.

RESPONSE: Admit.

73. Admit that the officers and directors of LBL had a fiduciary duty to utilize "Generally Accepted Business Practices" when conducting business.

RESPONSE: Admit.

76. Admit that no officer, director or employee of LBL documented or recorded, prior to 2-1-2000, an opinion or belief that ARGENT had provided LBL with false, fraudulent, unreliable or misleading information.

RESPONSE: Admit.

79. Admit that LBL had the right to prohibit utilization of material that made reference to Allstate or LBL if LBL did not approve of the material's content.

RESPONSE: Admit.

97. Admit that LBL knew a portion of the video of Skeeter Coleman's presentation, exhibit "B", was being made available over the internet by ARGENT.

RESPONSE: Admit that LBL knew only after the fact.

106. Admit that LBL knew that Gary Brown had a history of success with multilevel marketing. (see attached exhibits 84-95)

RESPONSE: Admit that LBL was advised Gary Brown was successful but did no independent investigation so denies the remainder of the request.

107. Admit that Gary Brown had a history of success with multilevel marketing. (see attached exhibits 84-95)

RESPONSE: Admit that LBL was advised Gary Brown was successful but did no independent investigation so denies the remainder of the request.

108. Admit that LBL knew Gary Brown was VP of marketing. (see attached exhibits 84-95)
RESPONSE: Admit.

117. Admit that the money or amounts referenced in exhibits 288-290 was sent to ARGENT.
RESPONSE: Admit.

120. Admit that LBL did not document or record, prior to 2-1-2000, a disagreement as to any of the facts or opinions stated in exhibit 1013.
RESPONSE: Admit.

124. Admit that LBL did not take any action, prior to 2-1-2000, to prevent the utilization by ARGENT of exhibit 435.
RESPONSE: Admit.

133. Admit that LBL took no steps or action to change the representation of fact made by ARGENT in exhibit 511.
RESPONSE: Admit.

134. Admit that LBL sent the exhibits 169-210 (proposed agreement) to ARGENT.
RESPONSE: Admit.

135. Admit that exhibits 169-210 contain requirements of ARGENT that were not contained in exhibits 119-121. (119-121=App.24-27)
RESPONSE: Admit.

145. Admit that when officers of LBL told Sam Watson that if he did not sign the note, exhibits 220-222, he would

not receive an additional $200,000, LBL knew that ARGENT was in extreme financial difficulty.

RESPONSE: Admit that LBL knew ARGENT was in financial difficulty but denies the remainder of this request.

166. Admit that LBL contends to have never been committed, before 2-3-2000, to funding ARGENT any amount of money. (see exhibit 218)

RESPONSE: Admit.

168. Admit that as a matter of habit and routine practice officers of LBL reached conclusions in the course and scope of their employment with LBL based upon their individual experience, training, education and background.

RESPONSE: Admit.

169. Admit that LBL officers were expected by LBL to reach conclusions, in the course and scope of their employment with LBL, based upon their individual experience, training, education and background.

RESPONSE: Admit.

171. Admit that LBL officers form opinions, in the course and scope of their employment with LBL, based upon that individual officer's experience, training and background.

RESPONSE: Admit.

172. Admit that LBL has fully and completely disclosed to ARGENT the basis for LBL's refusal to fund any amount in excess of the $675,000 to ARGENT. ($675,000 is the amount reflected in exhibits 220-222.)

RESPONSE: Admit.

173. Admit that LBL has fully and completely disclosed to ARGENT the basis for LBL's refusal to fund any amount in excess of the $675,000 to ARGENT ($675,000 is the

amount reflected in exhibits 220-222.) and that the disclosure was made before 3-1-2000.

RESPONSE: Admit.

XI. SECOND SET OF REQUESTS FOR ADMISSIONS-BALANCE OF ADMISSIONS NOT DISPLAYED PREVIOUSLY IN APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC.,	§	
Plaintiff	§	
v.	§	
	§	Case No. 4:00CV3130
eWEALTH USA, eWEALTH AMERICA, INC., ARGENT CAPITAL CORPORATION, and ARGENT FINANCIAL SERVICES, INC.,	§	
Defendants	§	

REQUEST FOR ADMISSIONS TO
PLAINTIFF/COUNTER DEFENDANT

TO: Plaintiff/Counter Defendant, LINCOLN BENEFIT LIFE COMPANY, INC., and its counsel of record, Gary J. Nedved; Keating, O'Gara, Davis & Nedved, P.C.; 530 South 13th Street, Suite A; Lincoln, Nebraska 68508.

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants/Counter Plaintiffs, eWealthUSA, eWealth America, Inc., Argent Capital Corporation, and Argent Financial Services, Inc. propound to Plaintiff/Counter Defendant Lincoln Benefit Life Company, Inc., and its counsel of record, Gary Nedved, these Request for Admissions to be answered fully and under oath within thirty (30) days after service hereof.

Definitions:

1. For the purposes of these discovery requests, the terms "you", "your" and "yourself" shall pertain to Plaintiff/Counter Defendant Lincoln Benefit Life Company, Inc., and its counsel of record, Gary Nedved.

2. All named references to exhibits are stipulated to have no legal significance as used herein but used only for easy identification of the documents attached to these Requests for Admissions.

3. References to "ARGENT" will collectively and individually reference eWealthUSA, eWealth America, Inc., Argent Capital Corporation, and Argent Financial Services, Inc., the Defendants and Counter Claimants.

4. "Reasonable" means fair, proper, just, moderate, suitable under the circumstances; having the faculty of reason; rational; governed by reason; under the influence of reason; not immoderate or excessive; honest; fair; and equitable.

5. "Conclusion(s)" is defined as the logical consequence(s), result(s) or outcome(s), of a reasoning process.

6. As referenced herein, references to "LBL" include Lincoln Benefit Life, the Plaintiff and Counter Defendant.

7. As referenced herein, references to "Allstate" include Allstate Life Insurance Company or its parent company.

8. "ARGENT's business plan" or "the business plan" is defined as the business plan presented to LBL by ARGENT prior to October 1, 1999.

9. "Loan money" or "loan" or "lend money" or "lent money" is defined as the act of giving money by way of cash, check, bank draft or any other vehicle where money is transferred with the intention by the individual or entity giving the money that it be repaid in the future.

10. "Reasonably reliable"- of the type, quality and form usually relied upon by entities in the same or similar business and circumstance.

11. "Speculative" is defined as something that is not based upon reliable facts or reasonable assumptions.

12. "Generally accepted business practices"- those procedures or practices customarily and reasonably utilized by a business or corporation, within the same or similar industry or circumstance.

13. "Fiduciary duty" is defined as a duty to act in a manner consistent with a high degree of good faith and honesty. A fiduciary duty includes the duty to disclose significant information.

14. References to exhibits and their numbering as "*-*" includes the first and last numbered exhibits as well as all of those in between. For example, 114-116, would include references to 114, 115 and 116.

REQUESTS FOR ADMISSION - 2nd SET

1. Admit that all of the documents provided to ARGENT by LBL were LBL business records.

RESPONSE: Admits

2. Admit that LBL never at any time relied upon any financial projections or forecasts, formal or informal, regarding ARGENT's potential performance or profitability.

RESPONSE: Admits

6. Admit that LBL did not document or express in writing prior to February 3, 2000 a belief that the information contained in exhibit "217-18" was unreliable.

RESPONSE: Admits

8. Admit that LBL does not loan money in excess of $400,000 without determining the return and repayment of the loan.

RESPONSE: Admits that it is not the customary business practice of LBL to advance commissions to a marketing organization in excess of $400,000 without having a written agreement setting forth benchmarks, advance schedules and repayment schedules but denies the balance of the request.

9. Admit that LBL does invest money in excess of $400,000 without calculating or determining, formally or informally, the reasonable future value or return on the investment.

RESPONSE: Admits

10. Admit that LBL contends it was reasonable for LBL to not rely upon any financial projections regarding ARGENT before investing $475,000 in Argent.

RESPONSE: Admits

11. Admit that sometime before February 1, 2000 hand written notes were made to exhibits 133-134 by employees or officers of LBL. (133-134=App. 36-37)

RESPONSE: Admits

13. Admit that the hand written notes on exhibit 135 and 136 were made by an officer of LBL. (135-136= App. 38-43, notes not on Appendix exhibit)

RESPONSE: Admits

14. Admit that exhibits 135 and 136 were received from ARGENT without the hand written notes on the documents.

RESPONSE: Admits

15. Admit that LBL did not document or express in writing prior to 2-3-00 that ARGENT had not provided or made available adequate information to LBL in response to the written "due diligence" request, exhibit 163.

RESPONSE: Admits

16. Admit that the officers and directors of LBL had a fiduciary duty to LBL to report and document information fairly and accurately regarding ARGENT.

RESPONSE: Admits that the officers and directors of LBL had a fiduciary duty to LBL to report information regarding Argent but denies the balance of the request.

18. Admit that Skeeter Coleman was an employee of LBL at the time he answered the questions asked by Gary Brown as reflected in Video Exhibit "A" which is enclosed with these requests for admission.

RESPONSE: Admits

19. Admit that Skeeter Coleman was authorized to make representations on behalf of LBL and Allstate as reflected in Video Exhibit "A" which is enclosed with these requests for admission.

RESPONSE: Admits

20. Admit that the information presented by Skeeter Coleman in exhibit "A" which is enclosed with these requests for admission was true.

RESPONSE: Admits

21. Admit that the information presented by Skeeter Coleman in exhibit "A" which is enclosed with these requests for admission was reasonable.

RESPONSE: Admits

22. Admit that the information presented by Skeeter Coleman in exhibit "A" which is enclosed with these requests for admission was reliable.

RESPONSE: Admits

23. Admit that that Skeeter Coleman was in the course and scope of his employment with LBL when he made the statements that are contained on Video exhibit "A" which is enclosed with these requests for admission.

RESPONSE: Admits

24. Admit that Skeeter Coleman is qualified by experience, education, training and background to have the opinions which he expressed as evidenced by exhibit "A" which is enclosed with these requests for admission.

RESPONSE: Admits

25. Admit that all of the representations of Skeeter Coleman, as evidenced in exhibit "A" enclosed with these

requests for admission, were made with LBL's knowledge that the representations would be relied upon.

RESPONSE: Admits

26. Admit that LBL did not document or express in writing an opinion prior to 2-3-2000 that $400,000,000 of premiums could not be generated by the ARGENT marketing groups by the end of 2000.

RESPONSE: Admits

29. Admit that if Tom Wilson had directed Gene Wraith to utilize option #3 in Mr. Wraith's letter of January 18, 2000 Mr. Wraith would have followed Mr. Wilson's direction.

RESPONSE: Admits

37. Admit that LBL drafted the proposed agreement, attached exhibit "169-210" with language which, if executed by the parties, would not have required LBL to fund additional money to Argent (See Carol Watson deposition)

RESPONSE: Admits

42. Admit that Carol Watson did not know exhibits 120-121 existed before 2-4-00.

RESPONSE: Admits

43. Admit that Carol Watson did not know exhibits 120-121 existed at the time exhibit 160-210 was prepared and originally submitted to Argent.

RESPONSE: Admits

44. Admit that Carol Watson was responsible for the contents of the proposed agreements attached as exhibit 160-210.

RESPONSE: Admits

64. Admit that LBL has a responsibility to fulfill commitments that it makes. (Wraith and Dahl depositions)

RESPONSE: Admits that LBL has a responsibility to perform legally binding and enforceable contracts which it enters into with third parties but denies the balance of the request.

XII. THIRD SET OF REQUESTS FOR ADMISSIONS-BALANCE OF ADMISSIONS NOT DISPLAYED PREVIOUSLY IN APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC.,	§	
Plaintiff	§	
v.	§	
	§	Case No. 4:00CV3130
eWEALTH USA, eWEALTH AMERICA, INC., ARGENT CAPITAL CORPORATION, and ARGENT FINANCIAL SERVICES, INC.,	§	
Defendants	§	

REQUEST FOR ADMISSIONS TO PLAINTIFF/COUNTER DEFENDANT

TO: Plaintiff/Counter Defendant, LINCOLN BENEFIT LIFE COMPANY, INC., and its counsel of record, Gary J. Nedved; Keating, O'Gara, Davis & Nedved,

P.C.; 530 South 13th Street, Suite A; Lincoln, Nebraska 68508.

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants/Counter Plaintiffs, eWealthUSA, eWealth America, Inc., Argent Capital Corporation, and Argent Financial Services, Inc. propound to Plaintiff/Counter Defendant Lincoln Benefit Life Company, Inc., and its counsel of record, Gary Nedved, these Request for Admissions to be answered fully and under oath within thirty (30) days after service hereof.

Definitions:

1. For the purposes of these discovery requests, the terms "you", "your" and "yourself" shall pertain to Plaintiff/Counter Defendant Lincoln Benefit Life Company, Inc., and its counsel of record, Gary Nedved.

2. All named references to exhibits are stipulated to have no legal significance as used herein but used only for easy identification of the documents attached to these Requests for Admissions.

3. References to "ARGENT" will collectively and individually reference eWealthUSA, eWealth America, Inc., Argent Capital Corporation, and Argent Financial Services, Inc., the Defendants and Counter Claimants.

4. "Reasonable" means fair, proper, just, moderate, suitable under the circumstances; having the faculty of reason; rational; governed by reason; under the influence of reason; not immoderate or excessive; honest; fair; and equitable.

5. As referenced herein, references to "LBL" include Lincoln Benefit Life, the Plaintiff and Counter Defendant.

6. As referenced herein, references to "Allstate" include Allstate Life Insurance Company or its parent company.

7. "ARGENT's business plan" or "the business plan" is defined as the business plan presented to LBL by ARGENT prior to October 1, 1999.

8. "Loan money" or "loan" or "lend money" or "lent money" is defined as the act of giving money by way of cash, check, bank draft or any other vehicle where money is transferred with the intention by the individual or entity giving the money that it be repaid in the future.

9. "Fiduciary duty" is defined as a duty to act in a manner consistent with a high degree of good faith and honesty. A fiduciary duty includes the duty to disclose significant information.

REQUESTS FOR ADMISSION THIRD SET

9. Admit that Larry Dahl is qualified by experience, training and background to express the opinions in the attached exhibit "A".

RESPONSE: Admit

20. Admit that Gene Wraith is qualified by experience, training and background to form reliable opinions regarding matters testified to as appears in exhibit "B".

RESPONSE: Admit

21. Admit that Gene Wraith is qualified by experience, training and background to express the opinions in the attached exhibit "B".

RESPONSE: Admit

EXHIBIT "A"

Q: In your memorandum, you said this is a bet on a distribution system?
A. Yes.
Q. The agents are a part of the distribution system, I presume?
A. Yes.
Q. What else is part of the distribution system?
A. The management team.
Q. You said this is a bet on distribution, we think that this is a reasonable bet. Who is we?
A. We are the folks here who looked at it. So that would be in my mind Bob Rich, Gene Wraith and myself.

EXHIBIT "B"

Q. If you assume that an experienced marketing group and let's just take a number of files and – so we have a sufficient sample, with an average of five or more years experience in selling LBL's entire portfolio of products, fixed and variable, with an emphasis on permanent rather than term insurance, would it be reasonable to expect them to generate an average

[52]

of at least $40,000 a year, of the first year premium for their sales?
A. With Lincoln Benefit or from their sales in general?
Q. With Lincoln Benefit, assuming they spent the majority of their time selling Lincoln Benefit products.
A. If they spent the majority of their time selling Lincoln Benefit's products, it's reasonable they would sell 40,000 or more.

EXHIBIT "C"

Q. When you had this document in your hand -- I'm talking about 42 -- what's a PE multiple?
A. That's a multiple price to earnings.
Q. What's it typically used for?
A. For determining the value of a stock or the value of a company.
Q. When you had this document in your hand -- and I'm not talking about today, now.
A. Uh-huh.

[114]

Q. I'm talking about LBL in their hands or possession --
A. Uh-huh.
Q. -- there's a bottom line down there. What was the value using that ratio?
A. Four -- let's see, looks like 403,049,360. And that's a -- the line says it's a valuation based on a 20 PE multiple, which would be an unreasonable multiple to begin with for this type of an organization. A 13 multiple would probably be an industry average on that. So that would be -- that would be unreal based upon unreal projections.
Q. You think a realistic ratio is 10?
A. It could be 10, yeah.
Q. It could be a million. My question was, since -- does 10 sound like a realistic ratio?
A. It does, yeah.

XIII. LBL's ANSWER TO COUNTERCLAIM BY ARGENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINCOLN BENEFIT LIFE COMPANY, INC.,	§	
	§	
Plaintiff	§	
	§	Case No. 4:00CV3130
v.	§	
	§	
	§	Plaintiff's Reply To
eWEALTH USA, eWEALTH AMERICA, INC., ARGENT CAPITAL CORPORATION, and ARGENT FINANCIAL SERVICES, INC.,	§	Defendant's Amended Answer and Plaintiff's Answer to Defendant's Counterclaim
	§	
	§	
	§	
Defendants	§	

COMES NOW the plaintiff, and for its reply to defendant's amended answer and answer to defendant's counterclaim, states as follows:

1. Generally denies each and every allegation of the defendant's amended answer except those allegations that constitute admissions against the interests of the defendants.

2. Generally denies each and every allegations of count I of the defendant's counterclaim.

3. Generally denies each and every allegation of count II of the defendant's counterclaim.

4. Affirmatively alleges that the letter dated August 20, 1999, was an agreement to make a future contract and was not binding on the parties because all of the terms were not agreed to and important elements were left for future negotiations.

5. Affirmatively alleges that the loan agreement of February 3, 2000 is a completely integrated written document purporting to express the terms of the contract between the parties, and that the Nebraska parol evidence rule renders ineffective any evidence of a prior oral agreement which adds to, alters, varies, or contradicts the terms of the loan agreement of February 3, 2000.

6. Affirmatively alleges that the loan agreement of February 3, 2000, is a contract complete in itself and supersedes and discharges any prior agreements made between the parties.

LINCOLN BENNEFIT LIFE
COMPANY, INC., plaintiff

By: (signature of Gary J. Nedved)
Gary J. Nedved, No. 15508
KEATING, O'GARA, DAVIS
& NEDVED, P.C.
A Limited Liability Organization
530 South 13th Street, Ste. A
Lincoln, Nebraska 68508
Telephone: (402) 475-8230

XIV. EIGHTH CIRCUIT RULES FOR PUBLICATION

8th Circuit Rules for Publication

8th Cir. R. App. I(4)
An opinion should be published when it establishes a new rule of law or affects an existing rule, newly interprets or

conflicts with a decision of a federal or state appellate court, applies an established rule of law to facts significantly differing from those in published opinions, involves a legal or factual issue of continuing public or legal interest, rejects the rationale of a previously published opinion in the same case, or is a significant contribution to legal literature.

8th Cir. R. 28A(i)

"Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.

XV. FEBRUARY 2000 LOAN AGREEMENT

LOAN AGREEMENT

THIS AGREEMENT is made by and between LINCOLN BENNEFIT LIFE COMPANY ("LBL"), of Lincoln, Nebraska; eWealthUSA ("Borrower"), 5410 Maryland Way, Site 440, Brentwood, TN 37027, and is made with reference to the following:

A. LBL and the Borrower engaged in negotiations in 1999 and January 2000 regarding a potential marketing plan to be designed and implemented by Borrower involving LBL products.

B. The negotiations have ended with a decision that Borrower will not implement such marketing plan with LBL, but instead will search for another insurer to implement such marketing plan.

C. LBL has previously advanced Four Hundred and Seventy Five Thousand Dollars ($475,000) to Borrower to fund the design of such marketing plan, and will advance another Two Hundred Thousand Dollars ($200,00) to borrower for operating expenses upon Borrower's execution of this Agreement, and in reliance on Borrower's agreements and promises herein. The total amount advanced to Borrower will be Six Hundred Seventy Five Thousand Dollars ($675,000).

NOW THEREFORE, in consideration of the recitals and the agreements herein, the parties agree as follows:

1. LBL agrees to loan to Borrower the additional sum of Two Hundred Thousand Dollars ($200,000), which together with the prior advances of four Hundred Seventy Five Thousand dollars ($475,000) made in 1999

and January, 2000, totals Six Hundred Seventy Five thousand dollars ($675,000) (the "Loan"). The Loan will be evidenced by this Agreement.

2. Borrower agrees to pay to LBL the principal amount outstanding of the Loan and any interest due as described below. Borrower agrees that this payment obligation is absolute and is not dependent upon the earning of commissions from LBL.

3. The term of the Loan shall be 42 months. The loan shall be interest-free for the first twelve (12) months of the term. Beginning the thirteenth (13th) month and until the end of the term, the Loan shall bear interest at the rate of eight percent (8%) per annum.

4. Payment shall be made in thirty-six (36) monthly installments of Twenty One Thousand One Hundred fifty Two Dollars and Five Cents ($21,152.05). Payments shall commence on the February 1, 2001 and continue on the first (1st) day of each and every month thereafter until the Maturity Date of January 31, 2004, at which time any remaining unpaid principal and all accrued and unpaid interest hereon shall be due and payable in full. The amortization schedule for the Loan is attached hereto as Exhibit A and made a part hereof. Should Borrower repay Five Hundred Forty Thousand Dollars ($540,000) of the outstanding principal of the Loan by January 31, 2001, LBL will forgive the balance of the outstanding principal of the Loan and the Loan will be deemed to have been paid in full.

5. The Loan shall be secure by all commissions payable to Borrower pursuant to its Master Broker Agreement with LBL. Borrower agrees to make, execute and deliver such security agreements, financial statements or other instruments as may be necessary or desirable for LBL to realize the benefits of its security.

6. The right granted to LBL herein as security on the Loan shall be in addition to, and not have any effect upon, the rights granted LBL under the terms of is Master Broker Agreement with eWealth or any such agreement executed in the future.

7. The loan shall be immediately due and payable if:
   a. Borrower fails to pay any installments or portion of the Loan when the same shall become due and payable, or
   b. Samuel B. Watson ceases to hold the title of/or perform the responsibilities of the President and Chief Executive Officer of the Borrower.

8. All Notice or other communications required to be give pursuant hereto shall be in writing to the address of the parties as follows:

   Lincoln Benefit Life Company
   206 S. 13th Street, Suite 100
   Lincoln, NE 68510
   ATTN: B. "Eugene Wraith, President

   eWealthUSA
   5410 Maryland Way, suite 440
   Brentwood, TN 37027
   ATTN: Samuel B. Watson, President

8. The Loan, plus accrued interest, shall be payable without notice, presentment, protest or notice of any kind, all of which is hereby expressly waived.

9. No amendment or waiver of any provision of this Agreement nor consent to any departure by the Borrower therefrom, shall in any event be effective unless the same shall be in writing and signed by LBL,

and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which is given.

10. This Agreement shall be construed and applied in accordance with the laws of the State of Nebraska. This Agreement is performable in Lancaster County, Nebraska. Any action or proceeding under or in connection with this Agreement or any other party ever liable for payment of any sums of money payable on this Loan Agreement may be brought in any state or federal court in Lancaster County, Nebraska.

11. This Agreement is made as of February 3, 2000.

Lincoln Benefit Life Company	eWealthUSA
By: (Larry Dahl)	By: (Sam Watson)
Lawrence W. Dahl, JD, CPA	Samuel B. Watson
Executive Vice President	President and C.E.O.

AMORTIZATION SCHEDULE ATTACHED AS EXHIBIT "A"

XVI. JANUARY 28, 2000 FAX FROM ARGENT TO LBL

(EWEALTH HEADING)
FAX

To: Gene Wraith	From: Sam Watson
Fax: 402-328-5005	Pages: 1 including cover
Phone: 402-328-5000	Date: 01/28/00

Re: Lincoln Benefit / eWealthUSA Relationship CC:

- Comments: Dear Gene:

I spoke with Larry Dahl yesterday and he informed me that to his knowledge you had heard nothing from Tom Wilson as of yet. Is that still the case? If so, please inform him that we have a time bomb that will explode on Monday. That bomb being our payroll and an enormous group of contracts and unpaid bills that have piled up.

Each of our companies agreed to the terms of the funding and executed an LOI months ago. In order to satisfy you, many things have been done at considerable expense, including the board voting to spinoff eWelathUSA which is in progress. At that point eWealthUSA stopped all negotiations with other life insurance carriers as we said we would and relied on LBL for the funding, which began as promised. We made commitments based on LBL's funding commitment to us.

The bottom line is that if we don't receive funds Monday morning in the amount of $125,000 as agreed for January, 00, both of us are going to have a serious problem.

I look forward to hearing from you.
(Signature of Sam Watson- first name only)

XVII. GENE WRAITH TRIAL TESTIOMY

[Bernard Gene Wraith, Direct 208]

Q. Were you concerned about giving them some advance?
A. Yes.
Q. Okay. And what were your concerns?
A. If I would get it back.
MR. DICKENS: Objection, Your Honor; controverts the admitted matter that they've admitted that they never - they have a fiduciary obligation not to invest in speculative businesses. He's admitted they did not -- they never believed it to be a speculative investment when they paid the money.
THE COURT: That will be overruled. Go ahead.
MR. DICKENS: Might I, for my convenience and the Court's, might I have a running objection as to the controversy in the admitted matters?

[Bernard Gene Wraith, Direct 209]

THE COURT: Well, in general, you may. The difficulty is, of course, I don't know at any given point in time where you may think that they're controverting an admitted matter. So for purpose of your record, I can't very well protect you -- I don't have -- I understand what you're telling me. You don't want to interrupt. And I appreciate that civility. But if you really think something is coming up that converts an admitted matter that you want to point to, and you may need to at the Court of Appeals, I would suggest that you do that, not because you'll be causing me difficulty, but you may cause them difficulty. You see what I'm getting at?
MR. DICKENS: Oh, yeah. Oh, yes, Your Honor, I understand. I will protect the record when necessary. But it's my understanding, and this is not -- please accept this in the spirit offered.
THE COURT: Sure.

MR. DICKENS: My understanding is, from what's going on, you're going to hear the evidence that comes in. It's just a matter of protecting my record, and I'll make sure I make the objections.
THE COURT: Yeah. Throughout this, so that I understand, you've got a parol evidence problem that's going to creep in and out of here. And it is difficult to sort out when that comes because of the fact that we've got

[Bernard Gene Wraith, Direct 210]

defensive matters as one of the issues that you raised earlier. And I appreciate that. What I want to do and what I intend to do is to hear all of the evidence and consider that evidence which is appropriately admissible. You need to make your record, not because you will confuse me if you don't, but you may confuse the Court of Appeals. And that's what my only concern is.
MR. DICKENS: Your Honor, I appreciate that, and I recognize this is a bench trial, and things -- the trappings that go with it. And I'll try to be conservative in my objections.
THE COURT: All right. Thank you. Go ahead, counsel.
BY MR. NEDVED:

[Bernard Gene Wraith, Direct 227]

disbursements by the company.
Q. Now, in the upper right-hand corner there is a notation about what it's in payment of; is that right?
A. That's correct.
Q. And what is marked there?
A. Marketing allowance for MBA.
Q. And why did you label this one hundred thousand dollar advance as a marketing allowance to an MBA?
A. Because that's what I considered it to be. It was an amount of money to enable this organization to begin to

market LBL products through their organization.
Q. Now, I also – Well, let me go back and ask you this question. If this would have been in payment of some type of contractual obligation, would we expect to see a different notation on this check requisition form?
MR. DICKENS: Objection; speculation, Your Honor.
THE COURT: That'll be overruled. You may answer.
THE WITNESS: Yes.
BY MR. NEDVED:
Q. What would you expect to see on a check requisition form if it had been paid under some type of a contract?
A. Specific reference to the contract.
Q. Now, as we go down the check requisition form, there's an indication that it's to be sent personally to Sam Watson overnight; is that correct?

[Bernard Gene Wraith, Direct 267]

A. Well, there were a number of reasons. One was that they continued to talk about the opportunities, but the results weren't coming through the door. And it didn't seem to me that they were any closer to turning that proverbial corner than they had been months before that. And I no longer – That we had already made an offer to them how we would proceed with lending them additional funds. They had turned down the offer, so, in my mind, an offer was put on the table, they rejected the offer. Now I wanted my money.
Q. Did you think they'd take that offer when you made it to them in December?
A. Yes.
Q. Did you have any reason to believe they wouldn't take the offer?
A. No.
Q. How did you advise Sam Watson of the decision that you were not going forward?
A. In a conference call made from my board room late one

afternoon with Larry Dahl and Bob Rich.
Q. The three of you were together?
A. Yes, that's correct.
Q. And what did you tell Mr. Watson?
A. I told Mr. Watson that we were going to discontinue the arrangement, and that I wanted to make arrangements with him to have our funds returned to us, that we wished them well,

[Bernard Gene Wraith, Direct 397]

Q. Calling your attention to, once again, to 29. You referenced on the second page, sir, number three, sentence starts, continue our relationship with a full national rollout. If you had continued the relationship that existed on January 18th, 2000, with eWealth, what would that relationship have been?
A. Well, it would have been that we would have continued to advance them monies, the indebtedness to us would continue to increase, and that they would write business, and I would retain commissions against the indebtedness, and just as we've discussed.
Q. Calling your attention to the bottom of the first page, eWealth -- I'm sorry, sir, that last sentence, eWealth is ready to roll out their program on a national basis. Was that statement true, sir?
A. That was my understanding.
Q. Was your understanding correct, sir?
A. I have no way of knowing that. I would have based that upon information that Larry Dahl had provided me and information that had come from Sam Watson, but whether or not their information was correct, I have no way of knowing. It was my assumption.
Q. Second page, and I'm about through. I'm not far off my 30 minutes. I'm sorry. The last paragraph, you referenced in there the negative aspects, and what were the two

[Bernard Gene Wraith, Direct 398]

negative aspects that you reported to Mr. Wilson?
A. So in the next-to-the-last paragraph then?
Q. Yeah, I didn't count the thanks paragraph. I'm sorry. Starting within our sector of the industry, the second paragraph, that paragraph.
A. Oh, I'm sorry, I'm with you now. Within our sector of the industries, it's not income -- Oftentimes these funds are necessary, blah, blah, blah, blah, blah. She has trouble doing blah, blah, blah.
A. Oh, I apologize. I did that for myself. I'll do it silently. The negative aspects of this opportunity were the required funding amount in the first year and the securitization of the loan.
Q. Policy of positive aspects include -- what's the first one?
A. The unique large additional distribution system, potential for sizeable premium growth, lack of channel conflict, differential consumer segment, singular carrier representation. The management's previous success pattern and, to some extent, Lou Lower's familiarization with the company staff and initial instruction to LBL.
Q. All right, sir. Are you in the habit of giving Tom Wilson truthful and reliable information when you write him reports?
A. Yes.

[Bernard Gene Wraith, Direct 399]

Q. Absolutely; right? No doubt about it?
A. I'm in the habit of giving truthful information to anybody that I send, so I just don't consider Tom Wilson to be unique. It's truthful information.
MR. DICKENS: With the Court's permission, give me a second. Approach one more time there, Judge?
THE COURT: All right.

MR. DICKENS: I'm referencing Exhibit 66. I'll show it on the viewer.
BY MR. DICKENS:
Q. This is, for identification, can you still read that, Mr. Wraith?
A. Yes. It's a fax to me from Sam Watson dated January 28th of 2000.
Q. And are these some more of your writings in the corner, sir?
A. They are. They indicate that I faxed a copy to Larry Dahl from Bob Rich for their information, and asked that it be returned to my attention and dated -- and signed it and dated it on January 29th of 2000. And were you aware that -- No, you know what, Your Honor, sometimes it's a good time to quit. Now is a pretty good time.
MR. NEDVED: I'll second that, Your Honor.
MR. DICKENS: Okay. He's done. Next witness.
MR. NEDVED: If I may.

XVIII. LARRY DAHL TRIAL TESTIMONY

[Lawrence Dahl, Cross 558]

THE COURT: I agree.
BY MR. DICKENS:
Q. All right. We are at Exhibit 66, and we are at page number three.
A. I don't have it yet, because I moved the projections all together. So bear with me, please, a minute. I think I have now all three sets of projections here.
Q. Do you have one stamped three?
A. Yes, I do.
Q. Do you believe that that projection is the projection attached to your memorandum, sir?
A. I think it most likely is.
Q. Now, the notes on the right hand -- Sorry, get my big clip out of the way.

THE COURT: Can I have a page number, Mr. Dahl?
THE WITNESS: It is page three.
THE COURT: All right. Thank you.
THE WITNESS: And the projections on top say beginning 1-1-2000.
BY MR. DICKENS:
Q. Are these your handwritten notes in the right-hand side of that sheet, sir?
A. Yes, they are.
Q. You spent some time going over and analyzing the numbers, so you have a general understanding of what they

[Lawrence Dahl, Cross 559]

meant; correct?
A. Yes. I don't know if I actually did that myself or it was pursuant to a conversation, but somehow I did get comfortable with the numbers.
Q. These are not so technical a number as – Are you actually a CPA?
A. Yes.

[Lawrence Dahl, Redirect 611]

THE WITNESS: Equity, I presume, in eWealth.
THE COURT: Now, let's look at May 1st of 2000. And a discount to market price is 50 percent; is that right?
THE WITNESS: That's what it says, yes.
THE COURT: eWealth wasn't publicly traded at this time; was it?
THE WITNESS: Not the my knowledge. I didn't do any investigation though.
THE COURT: Well, eWealth, in the fall of '99, was a wholly-owned subsidiary of some other company?
THE WITNESS: I thought you were referring to May. I don't know if anything happened at May, but when we

were talking to them, to the best of my knowledge, they were part of whatever the holding structure was.
THE COURT: Do you have any knowledge about whether they had, they, eWealth, had any publicly traded stock at this time?
THE WITNESS: I don't recall that they did because I think that Sam Watson had told me that he believed his shares were worth whatever, but it was basically a subjective evaluation.
THE COURT: What -- his shares in what? In eWealth?
THE WITNESS: In whatever he had, eWealth or Argent.

[Lawrence Dahl, Redirect 612]

THE COURT: There's been some testimony that Argent was publicly traded during this period of time. Do you have any knowledge about that?
THE WITNESS: No, I don't. I'm sorry.
THE COURT: When this conversion formula refers to a discount to market price, what market did you understand that meant? If you had any understanding.
THE WITNESS: If I would have looked at it with any type of substance, I would have assumed since it had average trading price, that it would have it be a publicly traded market. It would have to be, most likely in this case, Nasdaq.
THE COURT: All right. Now, did you have any understanding of what the discount to market price meant, the 50 percent, for example, on May 1st of 2000?
THE WITNESS: Once again, if I were to look at it, my understanding would be that if the shares were trading at ten dollars per share, that this would mean we would be able to acquire it on an equivalent of five dollars per share.
THE COURT: So for one dollar of Lincoln Benefit loan, you could buy two dollars of eWealth stock?
THE WITNESS: Yes.

THE COURT: Did you have any sense -- did you have any sense of what the capitalization of eWealth was going to be at the time you reviewed this?

[Lawrence Dahl, Redirect 613]

THE WITNESS: No, I didn't, because quite honestly, the conversion was of no interest to us. We're not in the business of owning any stocks, any venture capital, anything like that.
THE COURT: Now, I want to ask you now to turn your attention to page 174 of your file.
THE WITNESS: Okay.
THE COURT: In the last line, I want you -- where it begins 10-K, will you read that for me, because I'm not sure that I can read your handwriting.
THE WITNESS: Sometimes I can't, either. 10-K disclosure, why was two million credit line.
THE COURT: Okay. Now, are these notes -- These notes were made in February of 2000, as I understand it; is that right?
THE WITNESS: I think these were the March notes. March 6th.
THE COURT: March 6th, okay. Turn to 173, and on the upper left-hand corner, the copy that I have has 6-00 but it's your recollection that this was 3-6-00?
THE WITNESS: That's my recollection.
THE COURT: Okay. My understanding from what you said earlier was that this note had something to do with a conversation that intrigued you at about the same time that you had with Ms. Watson.

[Lawrence Dahl, Redirect 614]

THE WITNESS: I believe what happened was, we had the teleconference with Mr. Millar and Mr. Brown, and Carol was with me during that time, and we just had a follow-up

conversation. And I jotted down a note without a whole lot of -- whole lot he detail to it, obviously. But as I mentioned before, it did intrigue me because of the conversation we had.

THE COURT: Okay. Tell me what your note meant, if you know.

THE WITNESS: From my perspective, like I had, it's very sparse. But I think what intrigued me was that Carol had indicated that they had had prior conversation, they being Carol and Mr. Millar, and there were some issues out here, and Carol let me know that she looked at it or somehow found out that there was a 10-K disclosure that talked about the fact that eWealth didn't note that there was anything involved with us.

THE COURT: Forgive me for being blunt. Is it clear to you at this time that somebody from eWealth is making noises, complaints, about your refusal to give them two million bucks?

THE WITNESS: I think at this time it was fairly clear that there was an issue, maybe clouds in the area somewhere.

THE COURT: And Ms. Watson said something to you

XIX. KENNETH LEHRER TRIAL TESTIMONY

[Kenneth Lehrer, Cross 724]

Q. And this is a stock valuation model; is it not?

A. Yes, counsel.

Q. And for your corporate stock valuation technique, your first model on page 32 of your report, you've calculated 50 million dollars in total damages.

A. That is the diminution in value between the price of the stock before and after this event, so it comes to 50 million dollars.

XX. SAM WATSON TESTIMONY

[Sam Watson Depo. Pg 77]

Q. When the letter agreement was executed, was it your understanding, by your conversations with the LBL people, the Allstate people, that it was the intent of LBL that the letter be used by eWealth to promote the venture to investors and people who were wanting to participate as far as a sales group?
MR. NEDVED: Object to the form and foundation.
Q. (BY MR. DICKENS) Go ahead.
A. Actually, I want to say that there was a clause in there that we had to keep the terms of it confidential. I -- I -- I do believe -- I'm not sure, but -- but I -- I -- I believe that, yes, we could use it to raise money, but we couldn't make any public announcements.
Q. All right.
A. I think -- I think there were to be confidentiality agreements signed, as I recall, but --
Q. There's a document that addresses "Don't make it public, but I know that you're going to use it to promote." Is that your basic understanding?
A. Yes, it is.

XXI. CHRISTOPHER MILLAR TRIAL TESTIMONY

[Christopher Millar, Direct 1279]

purpose, but it describes generally the use of TV on the web and the like. There are requirements for the agent in respect of the laptop computers and what sort of technology they'd need to have to be able to have to communicate with the company. There was a general description signed by Mr. Watson of various -- related to the associate welcoming them and speaking of the products and support services that the company offered and how that worked. There is

further information and agent contracting information for medical --selling medical insurance and also disability insurance. And the rest of it is probably three of the same kits that we just described, and there is a drive tape.

Q. Does that exhibit, the blue box and its contents, accurately reflect the status of the development of the eWealth information that you were prepared to give to agents as of November 15th, the rollout meeting, sir?

A. That's correct.

Q. And the information -- Did you ever hear anybody from Lincoln Benefit Life at the rollout meeting complain about the use of their material or being listed as a strategic partner?

A. No. In fact, in a management meeting, it was about a week after Mr. Rich and Mr. Dahl had -- were down in Nashville, we had a management meeting with our heads of the

[Christopher Millar, Direct 1280]

various departments, being compliance people and our art people, Mr. Watson himself, and several of the other managers, where we needed to get permission to go to print on some of this material. And also the recording of the, what I call the drive tape or the recruiting tape there. And it was specifically asked of them, because they were provided with that information when they were down.

MR. GODFREY: Objection, Your Honor. If we could find out the foundation for his testimony, whether it's hearsay or not. I don't mean to interrupt the witness, but when he's giving these narrative answers, he's just telling something that happened, and I don't know whether it's based on something that he participated in or something that he was told. I apologize for interrupting, but it's a problem.

THE COURT: Can you tell us how you know what you just said?

THE WITNESS: Well, I can tell you how I know they gave permission to use these documents.
THE COURT: That's what I think counsel -- He wants to know the fund of your knowledge.
THE WITNESS: Sorry, Your Honor, I thought I made it clear I was part of a management meeting. These people were on a speaker phone with us.
THE COURT: That was not clear.
THE WITNESS: Sorry.

[Christopher Millar, Direct 1281]

THE COURT: And who was on the speaker phone?
THE WITNESS: The only voice I recognized was Mr. Dahl. I'm not sure whether Mr. Rich was with him. In fact, Mr. Coleman may have well been there as well. But the only one I recall was Mr. Dahl. We spoke and went through those various documents, and permission was given for us to go ahead and print those documents and go and record the recruiting tape.
MR. DICKENS: Tender Exhibit 124, Your Honor, for the purpose of establishing, number one, supporting testimony, and, number two, to show the status of the development of eWealth with regard to promotional material and brochures that would be necessary to roll out with agents, sir.
MR. GODFREY: I'm not sure I understand the offer.
THE COURT: I think here's what I understand. This is stuff that was made available to folks who attended the roll out meeting. The inference to be drawn from that is that eWealth USA would not have been promoting itself and LBL if it didn't have a relationship with LBL. That's the inference to be drawn, but that whether I draw that inference is a different thing. But the documents just being offered as being things that were made available to prospective agents at the rollout.
MR. GODFREY: For that limited purpose, that this

[Christopher Millar, Direct 1282]

was simply created and made available to the agents, we have no objection. Beyond that, obviously, we have a different view but that's not --
THE COURT: Sure.
MR. GODFREY: -- I think, necessary to resolve now.
THE COURT: Right. And you don't intend to have any more significance than that? In other words, you don't want me to look at one particular piece of the document and say, oh, my goodness, there's a statement in there that proves X.
MR. DICKENS: I would love for you to, but I understand you're not going to under this offer, Your Honor. That's correct.
MR. GODFREY: Because if that were to happen, we'd object on hearsay grounds. But I understand that's not what it's being offered for.
THE COURT: No, it's being offered to prove that the company made this available, including LBL documents, to prospective agents. And for that purpose it's received.
BY MR. DICKENS:
Q. Mr. Millar, at the November rollout, were you there?
A. Yes, I was.
Q. Did you have an opportunity to witness Skeeter Coleman's video -- excuse me -- Skeeter Coleman's presentation, sir?
A. Correct.

[Christopher Millar, Direct 1283]

Q. Did you have an opportunity to view the film we have of Mr. Coleman that is just Mr. Coleman alone that is in evidence and is subject to the request for admissions? Have you had a chance to review that?
A. Yes, I have.
Q. Have you had a chance to view the CD-ROM presentation which is in evidence with both the CD, we

subsequently introduced the flip chart, I believe, to show those documents. Have you had a chance to review separately that CD-ROM material that's in evidence with the Court?
A. Yes, I have.
Q. Now, you've had a chance to view Exhibit 109, I believe, sir. It is the compilation videotape of Skeeter Coleman that takes the CD-ROM presentation and has Skeeter speaking in the corner. Have you had a chance to view that, sir?
A. Yes, I have.
Q. Does it truthfully and accurately portray, with reasonable certainty, the presentation as it was made at the rollout meeting? In other words, for an agent sitting in the office -- in the audience. Man, where did I get that. Sorry. For an agent sitting viewing this, Mr. Coleman was speaking and to the back of -- behind him or to the side was the CD-ROM presentation playing; is that correct?
A. That's correct.
Q. Have we accurately re-created that presentation with

Exhibit 109?
A. We have.
MR. DICKENS: Your Honor, I tender at this time and would like to play Exhibit No. 109. It's not offered for the truth of the matters contained therein. Those matters are addressed, the truth of those matters are addressed in the admissions and the exhibits attached to them. Offering it to show the effect of the combining of the CD-ROM presentation and Mr. Coleman's speech as the agents viewed it.
THE COURT: Before I hear from counsel for LBL, let me ask you, I understand -- Well, I may not understand. Was there actually a -- was Mr. Coleman's presentation videotaped at the time it was actually given?
MR. DICKENS: Yes, it was.

THE COURT: And does this 109 contain that videotape?
MR. DICKENS: 109 contains -- I'll just explain how it was done. That's the easiest way to do it. When Mr. Coleman was speaking, behind him and to the side he had the CD-ROM presentation and he was controlling the screen.
THE COURT: Right.
MR. DICKENS: That was not part of the video that was taken that day.
THE COURT: Right.

[Christopher Millar, Direct 1285]

MR. DICKENS: So we have two pieces that he wasn't videoed with the CD-ROM presentation running. 109 actually creates, recreates by coordinating the CD-ROM screen changes, because you can actually see when he changes it with his arm and the topics change, it actually recreates that presentation to show the effect of the present -- CD-ROM presentation and Mr. Coleman, what they saw when they viewed it, sir.
THE COURT: All right. So where did you get the CD-ROM?
MR. DICKENS: The CD-ROM was produced by Lincoln Benefit Life. It is in evidence as an exhibit to requests for admissions, the contents of which have been admitted to be truthful.
THE COURT: All right. You've got a CD-ROM that Mr. Coleman used?
MR. DICKENS: Yes, sir.
THE COURT: Apparently there's no dispute that it, in fact, was used.
MR. DICKENS: Yes, sir.
THE COURT: Then you have a videotape of Mr. Coleman making his speech.
MR. DICKENS: Yes, sir.

THE COURT: In which he is -- you can't see it off screen because it's off screen, but he's using this CD-ROM

[Christopher Millar, Direct 1286]

and clicking it on so people can see whatever's on the videotape.
MR. DICKENS: Yes, sir.
THE COURT: And you've merged the two.
MR. DICKENS: Yes, sir. Simply by taking Mr. Coleman and shrinking him down in the corner where you can see him speaking, at the same time you see the CD-ROM presentation, the power point presentation flip at the appropriate time.
THE COURT: Okay. All right. Now I know -- have some sense of -- a little clearer sense. Is there an objection?
MR. GODFREY: Yes. Hearsay if it's for the truth of the matters asserted.
THE COURT: And he said it isn't.
MR. GODFREY: And I want to make sure about that. And secondly, my understanding, and perhaps I've misunderstood, but the CD-ROM didn't come from Lincoln Benefit, it came from eWealth, produced to us. That may be a misunderstanding on my part. Did it come from us? I apologize. We had a disagreement, but I'll go with Mr. Nedved on this one. So I withdraw that objection.
THE COURT: All right. So there's no question about the authenticity of the CD-ROM.
MR. GODFREY: Might I have half a moment, Your

[Christopher Millar, Direct 1287]

Honor? We seem to have a disagreement between my co-counsel again, and I don't want to put my foot in it again.
THE COURT: Sure. You can have longer than half a moment. You take whatever time you need.

MR. GODFREY: I think the best course, rather than take up the Court's time on this --
THE COURT: Sure.
MR. GODFREY: -- would be the Court has said it's going to be offered for a limited purpose, not for the truth stated therein, and I think at the next break I will see if I can get a resolution and understanding since we seem to have a slight difference of opinion between my colleagues as to whether this was our CD-ROM or not.
THE COURT: Would you like me to withhold ruling?
MR. GODFREY: If you wouldn't mind. I think we can go forward --
THE COURT: Do you want the play the thing?
MR. DICKENS: Yes, sir.
MR. GODFREY: I don't have objection to playing it with -- this is a bench trial, so I think that the Court could reserve ruling until I get an answer to the Court's question.
THE COURT: Well, cut to the chase here real quickly, if everybody agrees that Skeeter Coleman made a presentation and if everybody agrees that it was the video

[Christopher Millar, Direct 1288]

at this point and the videotape is authentic, and everybody agrees this he used the CD-ROM and the CD-ROM is and you then think, then, no matter who produced it, then the only question is putting these two things together somehow, gives an impression that is not accurate.
MR. GODFREY: That's part of it, but also, I need to understand and see if we have a consensus as to is this an accurate CD-ROM. But I will -- I think we can just play it and if you wouldn't mind after the break, we'll work through that.
THE COURT: That's fine. Go ahead and play it, and I'll reserve ruling on it. And I will limit it to the question of when the CD-ROM that's being played is an authentic copy

of the CD-ROM that was played at the time of Skeeter Coleman's presentation.
MR. GODFREY: Thank you.
THE COURT: Do you want to play the CD?
MR. DICKENS: It's a videotape. I'm not that technologically advanced to convert it yet.
(Videotape played at this time)
THE COURT: Let's stop for a minute.
MR. DICKENS: Did you mess that up?
THE COURT: How many federal judges does it take to turn on a television? Now, let's start over again.
(Videotape played at this time)

[Christopher Millar, Direct 1289]

THE COURT: Yes, sir. Shall we take our break?
MR. DICKENS: Yes.
THE COURT: Is that agreeable with you, counsel?
MR. GODFREY: Yes, it is, Your Honor. Thank you.
THE COURT: We'll stand in recess for 15 minutes.
(Recess from 10:32 to 10:42 a.m.; all parties present)
THE COURT: You may proceed.
MR. GODFREY: Thank you, Your Honor. Your Honor, I think if I might -- we'll withdraw the objection. I think we got the source, we're not going to dispute the CD-ROM insert was close enough, so we're going to withdraw that objection.
THE COURT: All right. Then may I have the exhibit number?
MR. GODFREY: It was 109, as I understand it, in my records, Your Honor.
MR. GODFREY: Yes, Your Honor, and it's my understanding it's being admitted for the fact that this was the video and the CD-ROM but not necessarily the truth of the statements contained therein.
THE COURT: Right. Except for the stuff about Nebraska football.

MR. DICKENS: Under the terms and conditions set forth by the Court prior, I'll tender the document, Your Honor.

[Christopher Millar, Direct 1290]

THE COURT: And the document again is?
MR. DICKENS: 109.
THE COURT; 109 is received.
MR. DICKENS: Thank you, Your Honor.
BY MR. DICKENS:
Q. Mr. Millar, if you would, please, pull Exhibit 153, sir. I think I stuck it there for you.
A. Right.
Q. The date on that document is November 24th, '99, just shortly after the rollout meeting. Is that correct?
A. This is November 16th.
Q. November 16th, I'm sorry.
MR. DICKENS: Let me compare, Your Honor, to make sure we're talking about the same document.
BY MR. DICKENS:
Q. I'm going to refer you to this one. Refer you to 153. Your Honor, I have messed up my exhibit numbers. Let me fix it for you. I'm sorry.
THE COURT: Well, 153 that I have in evidence looks to me like a fax January 8th to Sam Watson dated November 24th, '99.
MR. DICKENS: That's my fault. Let me get this. Well, it's not in here. 153, let's look at Plaintiff's Exhibit 7 first, Your Honor.
BY MR. DICKENS:

[Christopher Millar, Direct 1291]

Q. What is Plaintiff's Exhibit 7?

A. 7 is a memorandum from Mr. Watson, Mr. Sam Watson to Gene Wraith on the 16th of November, '99.
Q. And if you would, please, read the first paragraph, sir.
A. Hi, Gene. I want to thank you for assigning Larry, Bob, Skeeter and Debra to the eWealth USA relationship. Skeeter and Debra did a fantastic job on Saturday. Our agents are so excited that they have requested over 10,000 recruiting packets to begin the contracting process. The right people got the right message from Skeeter, Debra and eBank dot com's chairman and CEO, Rich Palentari.
Q. All right. If you would, please, sir, did they actually deliver recruiting packets in great numbers?
A. They did.
Q. And I call your attention to Plaintiff's Exhibit 8, and you can use the book right in front of you, sir, the white binder.
A. Is there a number?
Q. Eight.
THE COURT: Let me ask, do you wish to offer 7?
MR. DICKENS: Yes, Your Honor.
MR. GODFREY: No objection, Your Honor.
THE COURT: Received.
BY MR. DICKENS:
Q. With regard to Plaintiff's Exhibit 8, Mr. Millar, what

is that document?
A. It looks like it's exactly the same document that I just referred to.
MR. DICKENS: I'm sorry, Your Honor.
THE COURT: Go ahead.
THE WITNESS: I apologize.
MR. DICKENS: That wasn't my fault that time.
BY MR. DICKENS:
Q. What is Plaintiff's Exhibit 8, sir?
A. That is a letter from myself to the board of directors of Argent Capital Corporation.

Q. What were the circumstances giving rise to that being 13 drafted, sir?
A. Mr. Watson came into the office in the morning and said that he'd had a call from Mr. Wraith, and it was my understanding from that conversation --
MR. GODFREY: Objection; hearsay.
THE COURT: That'll be sustained.
MR. DICKENS: Your Honor, being offered for the limited purposes of Mr. Millar's state of mind and his understanding, that gave rise to the drafting, not to the truth of the matter regarding conversations Mr. Watson had with Mr. Wraith.
THE COURT: This is offered to explain why the letter of November 16, 1999, was drafted?

[Christopher Millar, Direct 1293]

MR. DICKENS: Yes, sir.
THE COURT: And not for the truth of what was had to the author of the document?
MR. DICKENS: Yes, sir.
THE COURT: With that understanding, the objection's overruled. Go ahead.
THE WITNESS: Mr. Watson had had -- he relayed to me a discussion he had with Mr. Wraith, which gave me some concern as it was nothing that had been discussed at any time and never been mentioned. So in an attempt to address the issue that I saw of a strategic partner that had made a request, I drafted this letter for the board and laid out what I understood the situation was and how I intended to address the situation.
Q. And did you subsequently take any measures to determine the validity of your concern you had? Were there any subsequent measures taken, sir?
A. Well, later that afternoon we had a board call. Now, let's make a distinction here. Board meetings were scheduled meetings, we issued advice, we would have a meeting,

minutes were recorded. Board calls were something that we had had probably at least once a week. They were typically not recorded by way of minutes, they were for discussion purposes between directors only. This document was discussed with the board. The board gave me permission

[Christopher Millar, Direct 1294]

to sell certain warrants but did not give me permission to reinvest the money by buying other stock. They only gave me limited permission to lend the funds back to the corporation at that point in time. So my total proposal as put forth to the board was not accepted, only the extent I could sell some warrants, but the funds had to be lent back in. So that was part of it. Two of the directors, being Mr. Davis and the chairman, Dr. Gutzman, expressed some concern that there was some sort of perhaps rumbling going on here. Mr. Watson had, at that point in time, made the statement that I'd probably not quite recorded what he had said to me. So they insisted that we contact Lincoln Benefit Life and ascertain if there was an issue. And that call, in answer to your question, that call was made the following morning. Mr. Watson has a habit or did have a habit of using a speaker phone. His office was right next door to me. He had made a call through to Mr. Wraith. He had asked the question –

MR. GODFREY: Objection. This is now narrative and it's hearsay. It's beyond even the document that the Court was entertaining limited testimony concerning.

MR. DICKENS: With regard to his testimony at this point, it's based upon personal knowledge of his hearing the offerings and hearing it, and that's not hearsay, Your Honor.

[Christopher Millar, Direct 1295]

THE COURT: Sure it is. I mean, you're offering it to prove the truth of what Watson said to Wraith.

MR. DICKENS: I'll develop it and clarify that point.
THE COURT: No. Before you do, tell me why it's not hearsay.
MR. DICKENS: Because if Mr. Millar was in Mr. Watson's room when he's having a conversation with Mr. Wraith on the speaker phone on a topic, that isn't hearsay, Your Honor.
THE COURT: Are you offering it to prove that what Mr. Millar heard was true?
MR. DICKENS: Offering it to prove what Mr. Millar heard was true from Mr. Wraith himself, sir.
THE COURT: You're saying that Millar actually heard Wraith make a statement.
MR. DICKENS: Yes, sir.
THE COURT: And you're saying that's not hearsay because Wraith is president of LBL.
MR. DICKENS: No, sir. I'm saying it's not hearsay because Mr. Wraith is on the phone with Mr. Watson. Mr. Millar is present in the room and hears the conversation between Watson and Mr. Wraith. To the extent he has personal knowledge and witnessed that conversation and overheard the conversation and recognizes the voice on the

phone, that's not hearsay.
THE COURT: Well, I guess I don't understand why -- you're offering the statement of a party -- of a person who is not present to prove the truth of the matter asserted. Isn't that the classic definition of hearsay?
MR. DICKENS: It is the classic definition of hearsay, but with regard to the statement of an adverse party, Mr. Wraith's statement against interest, it's an exception to the hearsay rule under 801.
THE COURT: Well, that's a different question. What is it that Wraith says that makes it -- He's not a party, so you're claiming he's an agent of a party and authorized to make a

statement on behalf of a party so we go through that. But what is it that he says?
MR. DICKENS: The assurances that they're not to worry. They're in the deal. They are funding.
THE COURT: Now, do you know what is going to be said, they're claiming that it's not hearsay because it's a statement of Wraith actually heard by this witness.
MR. GODFREY: Well, I think what he testified to was that he heard Mr. -- through the office, Mr. Watson was on the speaker phone. I don't even think he said he was in the room. And he hasn't established at this point that he ever spoke with Mr. Wraith directly before. So how would he know that it was Mr. Wraith as compared to Mr. So-and-so or

[Christopher Millar, Direct 1297]

whoever.
THE COURT: So the question now is whether there's foundation that he actually heard what he's about to say he heard and how he did that and how he could recognize Wraith's voice.
MR. GODFREY: Exactly.
THE COURT: All right. Lay that foundation. Then we'll figure out the objection.
MR. DICKENS: Thank you, Your Honor.
BY MR. DICKENS:
Q. Were you in the room hearing the conversation on the speaker phone between Wraith and Watson, sir?
A. Initially not, but after some conversation I did move through to Mr. Watson's office.
Q. All right. I'm going to ask you to only relay or discuss information that you heard specifically regarding that phone call and not what someone else told you about it, please, sir.
A. Okay. Fine.

Q. Have you had sufficient contact with Mr. Wraith so there was clearly identified that voice on the phone as Mr. Wraith as you overheard the conversations?
A. I had. I had heard Mr. Wraith on the phone on several occasions, and he continued to – Mr. Watson continually referred to Mr. Wraith as Gene. I know of no other Gene.

[Christopher Millar, Direct 1298]

This was clearly Mr. Wraith.
Q. And with regard to that phone call, what did Mr. Wraith represent with regard to any concerns that were expressed, sir?
MR. GODFREY: Still objection; hearsay, Your Honor. The witness was very careful of what he didn't say and did say in terms of he had heard Mr. Wraith on the phone before. I think the foundation that needs to be established is had he dealt personally and directly with Mr. Wraith ever before. Is he merely taking Mr. Watson's word for it that this was Mr. Wraith?
THE COURT: Let me ask you, sir, had you heard Wraith speak prior to this conversation?
THE WITNESS: Yes, I had.
THE COURT: And from that prior experience, were you able to satisfy yourself, independent of what Watson said, that the person that you were hearing was, in fact, Gene Wraith?
THE WITNESS: I had.
THE COURT: And that was based upon your prior listening to Mr. Wraith speak?
THE WITNESS: That's correct, Your Honor.
THE COURT: Can you tell me the occurrences when you'd heard Wraith speak before this conversation?
THE WITNESS: Mr. Watson would speak to Mr. Wraith

[Christopher Millar, Direct 1299]

on the speaker phone on a regular basis. So it was almost -- it was not daily, but it would be almost daily.
THE COURT: And you would hear -- overhear Watson talking to Wraith?
THE WITNESS: Either overhear or be in Mr. Watson's office when he was making the calls.
THE COURT: Did you participate in any of these earlier calls; for example, did you speak to the person who you believed to be Wraith on these earlier occasions?
THE WITNESS: No, I did not.
THE COURT: All right. Go ahead, counsel. Do you wish to renew your objection?
MR. GODFREY: Yes, sir, I think it's still hearsay.
THE COURT: That'll be overruled. You may answer.
THE WITNESS: Sorry. Could you read the question back?
THE COURT: The question is going to be what did Wraith tell you, but so that I'm clear, counsel, you are not objecting to the authority of Wraith to make the statements?
MR. GODFREY: If –
THE COURT: If it's actually Wraith.
MR. GODFREY: If it's actually Wraith, then depending upon what the statement is, he was the president of the company, so he has the authority that a president of the company has.

[Christopher Millar, Direct 1300]

THE COURT: So the answer to my question is no, I'm not objecting to the capacity of Wraith to make the statement.
MR. GODFREY: I think that's correct. I've not heard all the statement yet.
THE COURT: Okay. Go ahead, counsel.
BY MR. DICKENS:
Q. Mr. Millar, tell us about the conversation.

A. Well, the conversation stemmed from, obviously from the board, that request, and Mr. Watson had asked Mr. Wraith as to when we expected the formal document. Mr. Wraith replied with a very offhanded comment. I was not happy with it, I wrote a letter, and that's when I entered the room and put the note in front of Mr. Watson essentially saying ask again. When the appropriate time arrived, he did actually bring it up, bring the question up as to the provision of a formal document. Mr. Wraith really snapped back, very sarcastic, and came back and said, Sam, we committed. We're in the transaction. We're funding you, aren't we? He then went on and made several other comments to the extent of, Sam, I've done bigger deals than this on a handshake. He moved further on and made comments to make sure that we had stopped negotiations. That is the first time I heard that directly, that we stopped negotiations

[Christopher Millar, Direct 1301]

with other insurance companies; and further, this arrangement was to be kept extremely quiet and between ourselves. It was not made public until they had cleaned up their internal issues, being the fact that they had, the week before, let go, Allstate Life had let go a significant number of staff and agents.

BY MR. DICKENS:

Q. After that conversation a few weeks later or a week or so later, on December 1st you received another payment of one hundred thousand dollars from Lincoln Benefit; is that correct, sir?

A. That's correct.

Q. When you look at the funding schedule attached to Court Exhibit 1, how are they doing in accordance with the funding schedule as of that December 1 payment, sir?

A. The December 1 payment was listed here at $200,000. We received $100,000.

Q. And call your attention to Plaintiff's Exhibit 11 in the book there, sir.
A. Right.
Q. And that is a document from Sam Watson to Gene Wraith; is that correct?
A. That's correct.
Q. And what is the general gist of that document, sir?
A. Well, it's short. I can read it. Basically it says,

XXII. CLOSING ARGUMENT

[1611]

THE COURT: Where is there in this document a release of a breach of contract claim?
MR. GODFREY: There is no release in the form that the Court is looking for. We believe that the release is one as a matter of law if there was a pre-existing contract,

[1612]

THE COURT: Well, if you -- I mean, typically, if you -- if you're amending a contract or you're terminating a contract, or you're asking the other party to give up that claim, you'd say it; wouldn't you?
MR. GODFREY: Yes, but our position was there was no other contract. That the only contract ever noted and entered into was the February 3rd, 2000 loan agreement.
THE COURT: But wouldn't you think that if they were giving up a claim contract, they intended by virtue of this agreement to give up a claim --

[1613]

THE COURT: Well, but you understand that they're talking about a potential marketing plan in the recitals. There's no reference in there to a loan commitment.

MR. GODFREY: That's correct, because there was no loan commitment. Paragraph C says they previously had advanced $475,000.
THE COURT: But you're saying that they gave up their loan commitment claim when they signed this document because the words in the recitals regarding a potential marketing plan, that those negotiations had failed, must mean that there was no loan commitment.
THE COURT: Isn't the undisputed evidence in this

[Closing argument 1614]

case that both -- at the time this thing was signed, that Ms. -- Ms. Watson drafted this; right?
MR. GODFREY: Yes, she did.
THE COURT: And she knew nothing about this assertive claim at the time this was drafted.
MR. GODFREY: That's correct. Ms. Watson did not know that there was any allegation or assertion because no one on their side, throughout all the negotiations, Mr. Evans didn't do it, Mr. Watson didn't do it, Mr. Baitler didn't do it, no one said to Ms. Watson we already have a deal.
THE COURT: And Watson didn't think he had a claim, either.
MR. GODFREY: And Watson didn't think he had a claim, either.
THE COURT: But the question is not whether Watson had a claim but whether the corporation had a claim.
MR. GODFREY: Watson didn't either.
THE COURT: So if Watson -- if Mr. Watson and Ms. Watson weren't thinking about it and the language doesn't specifically talk about it, why do you think there's a meeting of the minds in terms of a release.
MR. GODFREY: Because Mr. Watson didn't say -- he wasn't talking about himself. Mr. Watson testified there was no contract, no binding funding contract between AFS or

[Closing argument 1615]

eWealth and Lincoln Benefit.
THE COURT: Right.
MR. GODFREY: And so he –
THE COURT: So it's not in his mind when he's signing this, it's not in Ms. Watson's mind when she's signing it.

[Closing argument 1616]

THE COURT: Well, for purposes of our argument, let me tell you that I am not yet convinced that you win if I find that this is an enforceable loan agreement as a defense to their counterclaim.

XXIII. RICH TESTIMONY

[Rich Deposition page 41]

Q. Are you aware of recruiting packets actually having been produced by Allstate and LBL and delivered to Argent?
A. I believe we sent them agent contracts. I don't know that – I don't recall any specific recruiting packets. But I know that they asked us to send them copies of agent contracts and some product brochures.
Q. Were you aware that agents had actually been signed up?
A. Yes. I mean, I think after the rollout meeting, there were some agents that –
Q. Were you aware products were sold?
A. I know at least a few products were sold.
Q. And they were not the mortgage product; correct?
A. Correct.

XXIV. CHRISTOPHER MILLAR DIRECT

[Christopher Millar, Direct 1261]

from Mr. Watson that it was an absolute requirement of LBL that the facility between the parties be kept between the parties other than the limited use that they allowed us, and they've admitted to being allowing us to use to certain investors. I had, later, had a discussion or part of a phone call which was on the 17th of November where it was confirmed directly by Mr. Wraith to both Mr. Watson and myself that this arrangement must stay between the parties because they had some internal issues they need to resolve, and those issues related to the laying off of a significant number of staff and agents, and what was expressed to us is, they did not want to be handling that issue at the same time as coming out and making a public announcement that they were now funding alternative or another distribution channel. And they asked us to keep this between ourselves until that issue had been resolved, and they then gave us permission to make the appropriate press releases.

Q. The SEC documents that we have in front of you, sir, the latest filing on the Exhibit 186-B was when, sir?

A. That was filed on the 15th of November, 1999.

Q. Did you actually go back and review the SEC filings, the evidence is before the Court, with the comments about the no existence of commitment to funding or some close phrase like that. Did you go back and review the SEC documents before they were filed to make certain there were no such negative

[Christopher Millar, Direct 1262]

statements, positive statements? What happened?

A. The -- I guess it needs to be an understanding as to how filings like this occur. And there is a distinction between a 10-KSB and a 10-Q. 10-K is filed at the end of the financial year, is a far more in-depth document. It must be

accompanied by audited statements, and the auditors issue a certificate in respect to that, and it's got to be included in that filing. It is a document that is drafted by -- or the K here was drafted by our SEC attorneys back at the end of '98. That was reviewed by all the board members. All the board needed to review and sign the K off along with the auditors. Once that is established and filed, and these are all filed electronically, then you go through a period of quarter end filings that occurs. The way we handle it, and it's the same way here, it was the same as most public companies that I've been in dealings with is that it's done on exception basis, that it's held on a computer, that the accounts are updated, that any relevant changes that have been made in terms of strategy, typically there's not a lot of movement between Qs and quarter end, then they're filed electronically. In this situation here, it was the same. We had a situation we filed where the CEO came and saw me, we went through the numbers that would go into the Q as of the scene of September. He sought any other comments that I

[Christopher Millar, Direct 1263]

wanted to make in respect of any changes in the company's direction. We had, at that point in time, a constraint in respect of the announcement or making public of our arrangements with Allstate-LBL. We didn't have those constraints in respect of our arrangements with eBank. LBL was happy that we made notice or put them on notice that they were a product provider but did not want to go any further than that. I made those comments to the CEO. He went and made the changes. I never saw that document. It was electronically post[illegible]e same way as we did every other quarter. Even if I knew of a negative phrase, which is actually in there, all I would have simply done is to remove the negative phrase. I would not have made a positive statement because of the requirement. My experience is

such with a number of public companies for a number of reasons, that if there was compelling business reason not to disclose an issue, as long as it's a positive issue, not an adverse requirement because there's separate guidelines for that; there's no requirement to make that disclosure. I got that information basically from my dealings with companies over time, but also not long after I came to the U.S., our SEC attorneys, being Tisdale Nicholson, provided me with a handbook of responsibilities for reporting companies. I reviewed that and got confirmation from that.

[Christopher Millar, Direct 1264]

I also had discussions with our SEC attorneys. I was not aware at the time I filed that that it's the same wording that appeared in our K at the end of '98 had continued on through the previous three quarters.

Q. Mr. Millar, I'm going to ask you to pull Exhibit 171 please, sir.

MR. DICKENS: Your Honor, it would be good to look at.

THE COURT: Okay.

MR. DICKENS: Thank you, sir.

THE WITNESS: Right.

THE COURT: I have it. Thank you.

BY MR. DICKENS:

Q. Exhibit 171 is an excerpt from a Guide to the Responsibilities and Requirements of Public Companies; is that correct?

A. That's correct.

Q. And is that published by, and I have a copy of the book here, is that published by R. R. Donnelly Financial?

A. That's correct.

Q. And is that the document you're referencing with the language that you discussed with the Court a few minutes ago?

A. That's correct. And that is the publication.

Q. Is R. R. Donnelly Financial, what kind of publications

[Christopher Millar, Direct 1265]

do they do, sir?
A. They do mostly publications for a lot of financial matters in the United States. They are the leading printer of Securities & Exchange Commission documents.
Q. Is this a commercial publication that's generally relied upon by persons of your occupation when determining filing requirements under the SEC?
A. It is. And most SEC firms use it as well.
Q. With regard to the exhibit that we have in the book, 171, sir, is that a true and correct copy of a portion of that book we've referenced, sir?
A. Yes, it is.
MR. DICKENS: Your Honor, I'll offer 171 with regard to 803-17, commercial publication generally relied upon by persons in his position.
MR. GODFREY: It doesn't qualify for a hearsay objection. This is a summary by R. R. Donnelly, the SEC filing requirements that are published and are the law.
THE COURT: The objection will be sustained. However, it may be admissible not for the truth of the matter asserted but to explain why it is this witness did or did not do something. Whether it's true or not is an entirely different question. The question then becomes whether his knowledge is relevant. And I think it probably is relevant because it tends to explain if the SEC's filing

[Christopher Millar, Direct 1266]

is inaccurate, that the inaccuracy was based upon a misunderstanding as opposed to an expression of his views at the time about the existence or nonexistence of this alleged contract. So I'd be willing to receive it not for the

truth of the matter asserted, but this was a document that the witness read or was aware of prior to the SEC filing and is offered to show his state of mind.
MR. DICKENS: Tender it for that limited purpose, Your Honor.
THE COURT: Counsel?
MR. GODFREY: I think that for that limited purpose I have no objection, Your Honor.
THE COURT: 171 is received for the limited purpose of showing state of mind.
BY MR. DICKENS:
Q. There were disclosures in Exhibit 186-B where -- I'll withdraw the question, Your Honor. I'll move on. Call your attention, Mr. Millar, to the Exhibit 168, sir.
A. Yes.
Q. What is that exhibit, sir?
A. It is a check from Lincoln Benefit Life to eWealth.
Q. What -- Who signed off on the check, sir?
A. I can't read the first signature, but the second one is

[Christopher Millar, Direct 1267]

Thomas Wilson.
Q. And why is it significant for you at eWealth to get a check from Tom Wilson, a check that's actually signed by Tom Wilson? Why was that of interest to you?
A. Well, it clearly signified that the president, the then president of Allstate Life was interested, was aware of this transaction.
Q. And the date on that check, I believe, is November 4th, 1999, sir?
A. Correct.
MR. DICKENS: Your Honor, at this time I would offer Exhibit 295 into evidence. It is a videotape that is a composite of several videotapes provided to opposing counsel. It's not offered for the truth of the matters asserted therein, but offered to show the Court and to evidence the

status of the development of eWealth with regard to materials and presentations. It's relevant to the issue of being ready to roll out and their readiness to start marketing product, but not the truth of the matters asserted therein.
THE COURT: Okay. Tell me a little bit more about when this video was made and for what purpose.
MR. DICKENS: The videos were all intact that they were removed from before the end of mid December. They were promotional videos that were used to promote the product.

[Christopher Millar, Direct 1268]

They were promotional videos which demonstrated ETV and how it was functioning. They're promotional videos that have part of the Hawaii rollout on it. It's part of --
THE COURT: Okay. So I'm understanding correctly, eWealth had these produced in roughly December of 1999, and you -- for the purpose of educating agents?
MR. DICKENS: Purpose of educating agents, promoting agents, showing the services, yes.
THE COURT: All right. And so you're offering these not to prove what's --not what is on the videos as true but rather to prove essentially only that the company wouldn't be going forward with this stuff unless they thought they had a deal with LBL.
MR. DICKENS: And to show the status of development, that's correct, sir.
THE COURT: Well, how does it show the status of development if I don't take it for the truth of the matter asserted?
MR. DICKENS: It's existence, existence of the material --
THE COURT: It's just the videotape itself. Not the worth on it.
MR. DICKENS: Correct, sir.
THE COURT: So somebody's not going to get on there and say we've got the best computer systems in the world.

[Christopher Millar, Direct 1269]

MR. DICKENS: If it says the truth of the matters asserted, no. With regard to the representation of where they had developed their system and their program to promote it to the agents, that's the relevance of this video.
THE COURT: So that they're making representations to agents?
MR. DICKENS: Yes, sir.

[Christopher Millar, Cross 1325]

Q. Under note nine, subsequent events?
A. Okay.
Q. Says, quote, on November 9th, 1999, the company announced its strategic alliance between eWealth USA and eBank dot com, Inc., to offer online banking services. And then it goes on to describe the strategic relationship between eBank dot com and Argent -- and eWealth USA. Do you see that, sir?
A. I do.
Q. Are the statements that were made here under subsequent event concerning the only strategic alliance noted in this SEC filing true statements as of the date, November 15th, 1999, or false statements?
A. Well, I can't answer in that format because I would, as I've explained to the Court this morning, the restriction that was placed on us by Lincoln Benefit Life in disclosure of the, one, the strategic relationship, and secondly, the funding, the issue in here in respect of the announcement of eBank is a true statement.
Q. Is it your testimony to this Court under oath that it was also a true statement that Lincoln Benefit Life had entered into a similar strategic alliance with you, but that it was not disclosed at their request in this SEC filing?

A. It is, and as I pointed out to the Court this morning, the very document and the advice I sought in the

[Christopher Millar, Cross 1326]

nonrequirement to disclose positive information if there is a compelling business reason not to disclose that information.
Q. Turn to page 13, please.
A. Sure.
Q. Under eWealth USA, if you go down four paragraphs, please.
A. Got it.
Q. And do you see the last sentence that says, quote -- this is page 13 of Plaintiff's Exhibit 86.
A. Right.
Q. Quote, funding is expected to be provided by investors and by strategic partners such as providers of various financial products to be sold through eWealth USA, but eWealth USA and the company do not presently have any binding commitments for funding, end quote. As of November 15th, 1999, was this a true statement or a false statement that was written in the SEC filing?
A. Okay. That was an incorrect statement. As I've already explained, if we go back to the previous three filings, you'll find the exact same wording in there. As I've also explained to you sir, it is a ministerial filing. It is ministerial act during the Qs to file and update. It's no similar, not dissimilar at all to any other public company, and I point you to Allstate Life's filings who also hold a

[Christopher Millar, Cross 1327]

similar type boilerplate wording that carries from Q to Q. This here was an oversight. Even if I was aware of it being there, I would not, repeat not, have made an affirmative statement. I was not required to. I was asked not to. And it's consistent with my reporting requirements.

Q. Well, sir, there's an affirmative statement in this document, Plaintiff's Exhibit 86, page 13, that the company and eWealth do not presently have any binding commitment for funding. Is it your testimony that that affirmative statement is a false statement or a true statement as of November 15th, 1999?
A. That is an inaccurate statement. I cannot answer it as a true or a false statement. You and I can do this interchange all day if you like. We can keep going around it. I've explained it this morning to the Court. I will explain it again if you wish.
Q. True or false, sir.
A. It is inaccurate.

[Christopher Millar, Cross 1342]

Q. And you personally have never spoken directly with Mr. Wraith before; correct?
A. I have been on, I believe, two, possibly three phone calls with Mr. Wraith. Have I spoken to Mr. Wraith? No.
Q. These are the phone calls that you testified to earlier this morning that Mr. Watson was having with Mr. Wraith and you either overheard him because it was on speaker phone or you went into Mr. Watson's office; is that it?
A. The two phone calls that I can recall very clearly, and I believe both of them were referred to in my deposition, so if you want me, I can turn you to those. The first one was on the morning, I think, of the 17th of November, and we reflected on that this morning. The second one was on the night of February the 2nd when Mr. Wraith relayed the message that they would not -- they would not be continuing with their commitment.